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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES MING HONG, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, in order to prove that a defendant may be held criminally liable as a "responsible corporate officer" for a negligent violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) & (c)(6), the statute requires the government to prove that the defendant was a *de jure* officer of the offending corporation and that he had a "responsible share" in the specific operations that caused the illegal discharge.

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## PETITION FOR A WRIT OF CERTIORARI

James Ming Hong respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 242 F.3d 528 (Pet. App. 1a-13a). The decision of the district court is unreported (Pet. App. 14a-34a). The oral decision of the magistrate judge is unreported (Pet. App. 35a-40a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was issued on March 8, 2001. This Petition for a Writ of Certiorari is timely filed within 90 days of the issuance of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

## STATUTORY PROVISIONS INVOLVED

Clean Water Act

33 U.S.C. § 1319(c)(1) & (c)(6) (1994)
33 U.S.C. § 1342 (a)(3) & (b)(8) (1994)
33 U.S.C. § 1362(5) (1994)

These statutes are reproduced at Pet. App. 41a-43a.

## STATEMENT OF THE CASE

The Statutory Scheme. The Clean Water Act (CWA) prohibits the "discharge of oil or other hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . in such quantities as may be harmful." 33 U.S.C. § 1321(b)(3) (1994). The CWA provides administrative, civil, and criminal penalties by which the government may enforce the Act's prohibition on unauthorized discharge of pollutants.

The CWA provides that criminal penalties may be imposed on "any person" who "negligently" violates the prohibition in Sections 1342(a)(3) and (b)(8) against discharging pollutants into waters of the United States. 33 U.S.C. § 1319(c)(1). A negligent discharge is punishable as a misdemeanor, for which the defendant may be imprisoned for not more than one year, fined not more than $25,000 per day of violation, or both, for a first offense. *Id.* A knowing discharge is punishable as a felony, for which the defendant may be imprisoned for not more than three years, fined not more than $50,000 per day of violation, or both, for a first offense. *Id.* Enhanced penalties are provided for subsequent misdemeanor or felony offenses.

Under the CWA, the definition of "waters of the United States" is broad, and the definition of "pollutant" expansive. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). There is no requirement that a discharge must exceed a minimum threshold amount before it may be punished criminally. Nor is there a requirement that the discharge be shown to have caused actual harm to the environment.

The definitional section of the CWA, 33 U.S.C. § 1362(5), provides that the "persons" subject to criminal prosecution include:

> an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

In addition, 33 U.S.C. § 1319(c)(6) provides for imposition of civil and criminal punishment based on the status of a person as a "responsible corporate officer":

> For the purposes of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

A person may be convicted under the responsible corporate officer pathway on a lesser quantum of proof than is required under other pathways to liability, which require proof of direct involvement in the illegal discharges.[1]

The Charges Against Mr. Hong. Petitioner James Ming Hong was charged by Criminal Information with one misdemeanor count of negligent failure to maintain and operate a wastewater treatment system and 12 misdemeanor counts of negligent discharge of polluted wastewater, in violation of Section 1319(c)(1)(A). On each count, the Information charged Mr. Hong with criminal liability solely and expressly as a "responsible corporate officer" of Avion Environmental, Inc., the company responsible for the illegal discharges.

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[1] *See, e.g., United States v. Iverson,* 162 F.3d 1015, 1026 (9th Cir. 1998) (responsible corporate officer charge relieves government of having to prove that the defendant personally discharged a pollutant or caused its discharge).

Prior to trial, the government stipulated that Mr. Hong did not personally "direct or participate" in any of the illegal discharges that occurred at Avion. Mr. Hong also stipulated that the illegal discharges alleged in the Information had occurred. Thus, the only issue at trial was whether Mr. Hong could be held liable, as a responsible corporate officer, for negligent violations of the CWA with respect to the discharges committed by Avion employees in which he had no personal involvement.

The unlawful discharges were not made into any waterway, but were released directly into the enclosed pipes of the Richmond, Virginia wastewater treatment system. Thus, the discharges passed through treatment facilities before they entered any waterway. None of the pollutants actually entered the external environment or caused any detectable environmental damage within the Richmond wastewater treatment system or any waters of the United States.

The government never introduced evidence that Mr. Hong had been designated as a *de jure* officer or director of Avion. It stated repeatedly, in pre-trial submissions and at trial, that Mr. Hong had taken considerable efforts to avoid having any official connection with the company, in order to insulate himself from Avion's financial liabilities. The government attempted instead to demonstrate liability under the responsible corporate officer provision, by showing that Mr. Hong was a substantial owner and investor in Avion and thereby was able to exercise substantial leverage over its operations.

Specifically, the Information charged Mr. Hong with liability as a responsible corporate officer, on the theory that he negligently failed to take steps to make certain that the Avion facility obtained appropriate wastewater treatment technology and that the treatment system was maintained and operated to achieve compliance with the facility's discharge permit. The Information charged Mr. Hong in Count 1 with a global failure to learn the facts known to Avion employees, to conduct appropriate investigations, and to make any necessary corrections. Mr. Hong's alleged failure to honor this duty of care was uniform throughout the period covered by the Information; he was not alleged to have had a greater or lesser degree of information, or to have failed to take specific steps, before any particular release. Rather, the 12 substantive discharge counts resulted from the government's decision to charge that Mr. Hong committed a separate negligent breach of his duty of care each time Avion employees committed an illegal discharge.

The government also filed "knowing" (felony) CWA charges against L. Robert Kirk, the person who managed the facility on a daily basis and directed the illegal discharges. Kirk was charged as a direct participant in the illegal discharges, and not on a "responsible corporate officer" basis. Kirk pled guilty to one felony charge and testified against Mr. Hong. He originally was sentenced to 18 months imprisonment, but this sentence was reduced to "time served" – less than eight months – in return for Kirk's cooperation in the Hong prosecution.

The evidence at Mr. Hong's trial showed that Kirk ran the Avion plant and had supervisory responsibility over the wastewater treatment operations. The employees reported to Kirk and received their orders from him and from no other person. None of the employees discussed wastewater discharges with Mr. Hong. The evidence

showed that Mr. Hong did not have supervisory authority over the physical functions of the plant, but that as an owner and investor he concentrated on Avion's finances.

The evidence further showed that when the plant was first outfitted, Mr. Hong participated in the acquisition of pollution control technology that was capable of treating its wastewater. On two occasions, the Richmond wastewater treatment system issued operating permits for the plant based on this technology, and the Avion facility operated within those permit limits for an extended period. The pollution control technology ultimately was overwhelmed by the volume of wastewater to be treated. This resulted in some discharges that exceeded permit limits. In addition, there were other discharges for which Kirk deliberately bypassed the pollution control system and released untreated wastes.

The government failed to show that Mr. Hong had contemporaneous knowledge of the failure of the Avion treatment system or that he learned within the period covered by the Information that illegal discharges had occurred. In particular, in its examination of Kirk, the government failed to obtain any testimony that Kirk had told Mr. Hong of the possible failure of the treatment technology or the occurrence of illegal discharges. Rather, the evidence showed that Kirk took affirmative steps to prevent Mr. Hong from learning that the pollution control technology would become exhausted earlier than had been expected during the purchase negotiations. Kirk did this by intercepting a letter from the salesman for the vendor (Bruce Stakeman) that would have informed Mr. Hong of this fact. At one point, employees of the Richmond municipal wastewater treatment authority caught Kirk in the act of making an illegal discharge; however, neither Kirk nor the municipal employees ever informed Mr. Hong that this release had occurred. Finally, when Kirk informed Mr. Hong that he had

bypassed the treatment technology, Kirk was terminated, new filtering media were purchased, the Richmond wastewater treatment authorities re-issued the permit for the plant, and Avion resumed wastewater treatment in compliance with permit limits.

Proceedings in the District Court. After a bench trial, the magistrate judge in an oral decision found Mr. Hong guilty on all 13 counts with which he was charged. He was sentenced to a term of imprisonment of 36 months, comprised of three consecutive one-year sentences on each of the first three counts, to be followed by a twelve-month period of supervised release. Mr. Hong also was fined $1.3 million. He began serving his term of imprisonment on August 26, 1999. He remains incarcerated as of the filing of this Petition. Mr. Hong thus already has been incarcerated for almost two years on these misdemeanor convictions. By contrast, Kirk served less than eight months upon his felony CWA conviction as the individual who personally caused or committed the illegal discharges.

Although the Information charged Mr. Hong solely as a "responsible corporate officer," the magistrate judge found Mr. Hong guilty on a different ground, based on his ownership and financial control over Avion.

> I do not have any doubt that Mr. Hong was not just an investor. He was an owner, pure and simple, whether you call it de facto or de jure. . . .

Pet. App. 37a. The term "owner," however, is not included within the statutory term defining "responsible corporate officer," which was the sole basis for liability set forth in the Information.

On appeal to the district court, Mr. Hong argued that an illegal constructive amendment, or fatal variance, had occurred, because the government had charged him with liability solely as a responsible corporate officer, but the magistrate judge had found him guilty on a different basis, as an owner.

Further, Mr. Hong argued that, as a matter of law, he could not be held criminally liable for negligence under the CWA on a "responsible corporate officer" theory, because the government had introduced no proof that (1) he had been designated as a *de jure* corporate officer of Avion; or (2) he had direct oversight responsibility for the wastewater treatment operations from which the releases occurred, or that he had contemporaneous awareness of possible illegal discharges and failed to conduct appropriate investigations and take necessary corrective actions. The district court affirmed the convictions on all counts and the term of incarceration. Pet. App. 31a-32a.[2]

The district judge affirmed on different grounds than the "ownership" standard adopted by the magistrate judge. The court found that neither the text of the CWA nor prior Fourth Circuit decisions defined the term "responsible corporate officer." The court accordingly constructed its own meaning for the term, and ruled that a person was

[2] The district court also determined that the magistrate judge had erred, as a matter of law, in calculating the sentence to be imposed under the CWA and remanded the case with directions that Mr. Hong be resentenced to a maximum fine of $400,000. Pet. App. 31a-32a. On the government's cross-appeal, the Fourth Circuit reversed the district court's decision on the fine portion of the sentence and directed that the fine originally imposed by the magistrate judge be reinstituted. Pet. App. 12a-13a. This Petition seeks review only of Mr. Hong's convictions on the underlying charges and does not seek review of the Fourth Circuit's decision on the amount of the fine.

chargeable as a responsible corporate officer if he possessed one or more of the following attributes:

> (1) some degree of control over the finances of the polluting entity;
>
> (2) the authority to manage one or more employees;
>
> (3) the power to negotiate on behalf of the polluting entity; and/or
>
> (4) the power to make binding commitments on behalf of the polluting entity.

Pet. App. 22a. The court found that Mr. Hong met all four branches of its *ad hoc* standard and concluded that, under this novel test, "the evidence at trial clearly showed that Hong was a RCO [responsible corporate officer], and that as such he knew or should have known of the illegal discharges." Pet. App. 23a (emphasis added). The court thus imputed the requisite *mens rea* to Mr. Hong based on his status as a "responsible corporate officer" and held him vicariously liable for the illegal acts of its employees, due to his ability to act for Avion in aspects of its business other than the wastewater treatment function.

The Fourth Circuit Decision. On appeal to the Court of Appeals, Mr. Hong argued that the Information charged him with liability solely as a responsible corporate officer, but that he had been convicted as an owner; and that this change in the basis for liability constituted an illegal constructive amendment.

Mr. Hong also argued that the district court had misstated and misapplied both essential elements of the responsible corporate officer doctrine. On the "officer" element, Mr. Hong argued that under the literal language of Section 1319(c)(6), his convictions were invalid because he was never a *de jure* officer or director of Avion. Further, Mr. Hong argued that he did not have a "responsible share" in the illegal discharges, under the definition of that element set forth in *United States v. Park*, 421 U.S. 658 (1975), in that he was not shown to have violated one of the duties of care that may be enforced under that standard of liability, with its diminished quantum of proof. In particular, he argued that the convictions should be overturned because the district court had not found that he had (1) supervisory responsibility for the specific functions of Avion that produced the illegal discharges, or (2) actual awareness of the possible failure of the pollution control system and subsequently failed to investigate and take corrective actions.

The Fourth Circuit affirmed the convictions on all counts. Pet. App. 13a. It did not rely on the district court's *ad hoc* formulation of the responsible corporate officer doctrine. Rather, the court devised its own novel test – the third *ad hoc* standard developed in this case – to fit the facts and held that Mr. Hong was properly held criminally responsible for his role in failing to prevent Avion's violations of the CWA.

With respect to the "officer" element of the responsible corporate officer statute, the Court of Appeals agreed with the government that Mr. Hong "went to great lengths to avoid being formally associated with Avion . . . ." Pet. App. 8a. It found, however, that "the Government was not required to prove that Hong was a formally designated corporate officer of Avion." Pet. App. 7a. Instead, it effectively re-wrote the statute and concluded that the

"pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA." *Id.* This elimination of the "officer" requirement also was the basis for the court's rejection of Mr. Hong's constructive amendment challenge. Pet. App. 7a (n.2).

With respect to the "responsible share" element, the Court of Appeals did not discuss the specific duties of care that *Park* found were legally enforceable and sufficient for a criminal conviction that did not violate the Due Process Clause. Rather, the court concluded that Mr. Hong "possessed authority to prevent the illegal discharges" and affirmed "for his role in failing to prevent Avion's violations of the CWA." Pet. App. 8a, 12a-13a.

## REASONS FOR GRANTING THE PETITION

The Court of Appeals has incorrectly decided an important legal question that is critical to the determination of the scope of criminal liability under the CWA and other environmental statutes.[3] The decision below is inconsistent with the statutory definition of "responsible corporate officer" and with the Court's decision in *United States v. Park*, 421 U.S. 658 (1975), concerning the "responsible share" element of liability. The Fourth Circuit erroneously based its decision on standardless notions of a functional "relationship to the corporation," rather than *de jure* officer status. It also erroneously relied on what it found was the defendant's ultimate authority over the affairs of the corporation, rather than personal supervisory responsibility over the specific corporate functions that produced the

[3] *See* 42 U.S.C. § 7413(c)(6) (the Clean Air Act provision concerning responsible corporate officer).

discharges or his awareness of possible violations and subsequent failure to investigate, as required by *Park*. The court thereby eliminated important protections that are essential to prevent CWA negligence charges under the responsible corporate officer provision, with its diminished quantum of proof, from operating as a *de facto* strict liability standard.

Further, the decision of the Court of Appeals is in conflict with the decisions of at least two other courts of appeals that have applied the responsible corporate officer doctrine under Section 1319(c)(6). The other courts have held a defendant liable under the responsible corporate officer provision only when the individual was a *de jure* officer of the offending entity. *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991) (public utilities director of a city); *United States v. Frezzo Bros., Inc.*, 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (president and secretary of the company). [4] Further, the First Circuit reached the same conclusion as the Tenth and Third Circuits in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), when that court analyzed the responsible corporate officer doctrine under another environmental statute, the Resource Conservation and Recovery Act.

Moreover, other courts of appeals have held a defendant liable under Section 1319(c)(6) only when the individual either had (1) personal supervisory responsibility over the specific corporate activities from which the illegal discharges occurred, or (2) obtained actual awareness of possible violations of the CWA in systems subject to his

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[4] *Cf. United States v. Iverson*, 162 F.3d 1013, 1022 n.6 (9th Cir. 1998) (noting but not reaching the issue, because the defendant did not argue that the jury instructions were erroneous "for failure to require a finding that defendant was a corporate officer or employee.")

formal control and failed to undertake appropriate investigations and corrective actions. *United States v. Iverson*, 162 F.3d 1013, 1025 (9th Cir. 1998); *Brittain*, 931 F.2d at 1420; *Frezzo Bros.*, 602 F.2d at 1420. *See MacDonald & Watson*, 933 F.2d at 50.

The holding of the Court of Appeals warrants review by this Court. Its decision dangerously extends criminal liability, in a manner not authorized by Congress, to persons who are not *de jure* officials of the corporation. Its decision also ignores the limiting principles incorporated in the responsible corporate officer doctrine under *Park* and would impose liability based on a subjective notion of plenary "control" over corporate activities generally, freed of any requirement that the defendant have direct connection to the specific activities that caused the illegal discharge. This approach is tantamount to creation of a strict liability standard that is inconsistent with the "negligence" requirement that Congress explicitly adopted in Section 1319(c)(1).

The decision below imposed substantial penalties on Mr. Hong, on a basis that dispensed with the normal requirements of proof for criminal liability. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), Justices Thomas and O'Connor dissented from the denial of certiorari in a case in which the lower court had relied on the public welfare offense doctrine to justify holding a person liable for a misdemeanor violation of the CWA. The dissenting Justices cited the breadth of the CWA criminal provisions and the "severity of the penalties imposed" as justifications for review. 528 U.S. at 1103. That same concern is even more clearly presented by this case.

The defendant in *Hanousek* was directly negligent in the release of 1,000 to 5,000 gallons of oil into the environment. He was sentenced to a term of six months imprisonment, followed by six months in a halfway house, followed by six months of supervised release, and was fined $5,000. 176 F.3d at 1120. Mr. Hong, by contrast, was convicted under the responsible corporate officer doctrine, with its diminished quantum of proof, for discharges that did not enter the environment and for which there was no evidence of his actual involvement. He was sentenced to far more severe penalties -- three years imprisonment, to be followed by one year of supervised release, and a $1.3 million fine. Indeed, while he was prosecuted only for misdemeanors, Mr. Hong received a far greater sanction than Kirk, who was convicted of a felony.

The decision below thus presents an extreme example of a concern that previously prompted two Justices to conclude that review by the Court would be appropriate. Petitioner respectfully submits that, for these reasons, the Court should grant the Petition and delineate the proper limits for imposition of criminal liability under the CWA, as a responsible corporate officer.

## I. The Fourth Circuit's Formulation of the Responsible Corporate Officer Provision Is Inconsistent with the Plain Language of the CWA and This Court's Decision in *Park*.

### A. The Responsible Corporate Officer Pathway to Liability.

The CWA provides criminal liability for "[a]ny person who (A) negligently violates" the substantive and permit limitations of the statute. Several pathways to liability have been recognized under this provision, including

the defendant's direct involvement in illegal discharges, *United States v. Boldt*, 929 F.2d 35, 38 (1st Cir. 1991), as well as personally causing or directing others to make illegal discharges, *United States v. Cooper*, 173 F.3d 1192, 1197 (9th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999). These pathways were not available in this case, because the government stipulated that Mr. Hong did not "direct or participate in" the illegal discharges.

Section 1319(c)(6) establishes another pathway to liability, upon proof that the defendant is a "responsible corporate officer:"

> For the purposes of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

The term "responsible corporate officer" is not further defined by the CWA. The courts of appeals that have interpreted the term have concluded that it was intended to expand liability beyond the scope defined by Section 1362(5).[5] Those courts have followed the principles in *United States v. Park* in defining and applying this term.[6]

*Park* established the requirements of the responsible corporate officer doctrine. There, a divided Court upheld the conviction of the chief executive officer of a company for

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[5] *United States v. Brittain*, 931 F.2d at 1419 (Section 1319(c)(6) expands liability under the CWA and allows *mens rea* to be imputed to the defendant by virtue of his position as an official of the offending entity); *United States v. Iverson*, 162 F.3d at 1026 (responsible corporate office pathway relieves the government of having to prove that the defendant personally discharged a pollutant or caused its discharge).

[6] *Iverson*, 162 F.3d at 1023-1024; *Brittain*, 931 F.2d at 1419; *MacDonald & Watson*, 933 F.2d at 51-52; *Frezzo Bros.*, 602 F.2d at 1130 n. 11.

violations of the Federal Food, Drug and Cosmetic Act, which permitted misdemeanor convictions for introducing adulterated food into interstate commerce without requiring a showing that the individual had been negligent. The evidence showed that the FDA had advised the CEO by letter of unsanitary conditions at the company's Philadelphia warehouse. 421 U.S. at 661, 664. A later inspection revealed similar unsanitary conditions at the company's Baltimore warehouse. The FDA also informed the CEO by letter of these problems, but a second inspection of the Baltimore warehouse revealed that the company still had failed to eliminate them. *Id.* at 662-663. The CEO was charged and convicted on five misdemeanor counts involving the conditions at the Baltimore warehouse and was sentenced to pay a fine of $50 on each count. *Id.* at 666.

In upholding the convictions, the Court cited a line of cases, beginning with *United States v. Dotterweich*, 320 U.S. 277 (1943), that permitted imposition of criminal liability on corporate officers based on the acts of others. Those cases contained broad language asserting that Congress could, consistently with the Due Process Clause, "dispense[] with the conventional basis for criminal conduct – awareness of some wrongdoing." *E.g.*, *Dotterweich*, 320 U.S. at 280-281. Recognizing the validity of concerns that this language, applied literally, might sweep within its scope many senior officials due simply to their formal position in the corporation, the *Park* Court emphasized the "limiting principle" articulated in *Dotterweich*, which narrowed the class of corporate officers who could be held criminally accountable for an alleged omission to learn of or act upon negative information. *Park*, 421 U.S. at 669.

This "limiting principle" restricted liability to corporate officers and to those officers "who . . . have a responsible share in the furtherance of the transaction which

the statute outlaws." *Id.* at 669, *quoting Dotterweich*, 320 U.S. at 284 (emphasis added). The Court recognized that an enforceable duty of care could be shown in one of two ways under the "responsible share" element: (1) the defendant had actual authority to exercise control over the specific activities that caused the illegal discharges (*id.* at 674, 675); or (2) the defendant failed to "implement measures that will insure that violations will not occur" (*id.* at 672) or, having implemented such control systems, obtained actual awareness of possible violations and then failed to carry out his "positive duty to seek out and remedy violations when they occur" (*id.*). With these limitations, the Court concluded that the responsible corporate officer doctrine may be applied consistently with fundamental notions of justice. *Id.* at 673.

Thus, as applied in *Park*, the "responsible share" element precludes the government from charging that the head of a corporation or a senior official is automatically liable for any illegal act committed by an employee nominally subject to his supervision. Rather, the senior official must have had some actual personal connection to and personal blameworthiness for the specific conditions or activities that violated the law – that is, there must be a showing that the defendant had actual "responsibility in the business process resulting in" a violation. *Id.* at 669.

Under *Park*, and taking Sections 1319(c)(1) and (c)(6) together, the CWA requires that for a person to be held liable for negligence under the responsible corporate officer pathway, the government must prove that the defendant (1) was a *de jure* officer; and (2) breached a duty of care imposed by law, either by possessing actual supervisory responsibility over the specific corporate activities that produced an illegal discharge; or, having delegated supervisory responsibility to another person, by failing to

establish pollution control systems in the first instance or by failing, after obtaining knowledge of potential problems with the operation of those systems, to investigate and take proper corrective actions.

Individuals who fail to satisfy these elements are not necessarily exempt from criminal liability under the CWA. The government may still attempt to prosecute them, but may not rely on the diminished quantum of proof necessary for liability under the responsible corporate officer doctrine. Rather, it must rely on another pathway to liability, one that requires proof of the defendant's personal involvement in the actual events that led to the illegal discharge.

In charging a crime, the government must choose which approach to follow. Having made its decision, the government must prove each essential element of the pathway it chooses. *See Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000); *Stirone v. United States*, 361 U.S. 212, 217 (1960) (government may not lawfully charge a crime under one pathway but prove it under another).

### B. The Court Below Ignored the Express Language of the CWA and Departed from the Principles in *Park*.

The Court of Appeals erred by devising its own novel formulation of the responsible corporate officer doctrine, a formulation that ignored the statutory requirement that a defendant prosecuted under this pathway must be a corporate officer. Further, the Fourth Circuit ignored the analysis of responsibility for the specific conditions that caused the illegal discharges, as required by *Park*, and erroneously applied a less demanding standard which required a showing

only that Mr. Hong possessed general authority to prevent the illegal discharges by virtue of his alleged position in the company. Pet. App. 19a-20a.

1. "Officer" Element. The literal language of Section 1319(c)(6) provides that liability may be imposed on a "responsible corporate officer." The term "officer" is unambiguous. It requires that the accused have been designated as a *de jure* officer of the company.

The term "officer" is well-known and strictly defined in established corporate law. When Congress, in drafting a statute, adopts a fundamental corporate law doctrine and fails to modify it, the standard common law rule must be applied. *E.g., Burks v. Lasker*, 441 U.S. 471, 478 (1979). This Court held in *United States v. Bestfoods*, 524 U.S. 51, 63 (1998), that this principle applies to environmental laws as well as other types of statutes. Since Congress adopted the term "officer" in Section 1319(c)(6) without modification, the Court of Appeals erred by failing to give this term its ordinary, established meaning. 524 U.S. at 63.

The Fourth Circuit found that "Hong went to great lengths to avoid being formally associated with Avion." Pet. App. 8a. It expressly declined, however, to apply the literal "officer" provision of the statute. It opted instead to rewrite Section 1319(c)(6) and apply a functional test – "whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA." Pet. App. 7a-8a. The court thereby erroneously ignored the plain, unambigu-ous language of the statute and relied instead on a circular and highly subjective test that threatens to increase substantially the exposure of corporate owners and investors to criminal liability.

2. "Responsible Share" Element. The court below departed from this Court's prior decision in *Park* by ignoring the specific breaches of duty that may be enforced through the "responsible share" element. The court instead relied upon the theory, advocated by the government and adopted by the district court, that Mr. Hong could be held liable because he had plenary authority over Avion – that is, he substantially controlled corporate operations.

While the Court of Appeals made some brief factual findings, its decision is nonetheless erroneous as a matter of law, because those findings were keyed to an overly broad standard of liability that conflicts with this Court's decision in *Park* and the limiting principles it there adopted so that this doctrine could be applied consistently with fundamental notions of justice.

In particular, the Fourth Circuit relied on purported factual findings by the magistrate judge, who held that Mr. Hong was liable as the owner of Avion – a basis for liability not followed by the district court. *Id.* However, the finding on which the Court of Appeals relied – that "evidence regarding Hong's relationship to Avion demonstrated his responsibility for the discharges" Pet. App. 8a (n. 2) – fails as a matter of law to support the convictions. It is based on notions of overall authority over a corporation. It fails to undertake the required analysis of the narrower duties of care

that are imposed by law and are enforceable under the responsible corporate officer doctrine: whether Mr. Hong had direct personal responsibility for discharge operations; whether he provided for installation of appropriate controls in the first instance; or whether he had reason to suspect that Kirk was failing to insure compliance with the discharge permit and whether, "once violations were unearthed . . . he did everything possible to correct them." *Park*, 421 U.S. at 677.

For these reasons, the judgment below warrants review by this Court, because of the Fourth Circuit's departure from the literal language of the CWA and this Court's decision in *Park*, and because of the significance of the broad and subjective expansion of liability under the CWA produced by its decision.

## II. The Decision Below Conflicts with Decisions of Other Courts of Appeals.

Other courts of appeals that have considered criminal charges under Section 1319(c)(6) of the CWA have imposed liability under the responsible corporate officer doctrine only when the accused was a *de jure* officer of the entity that committed the illegal acts. *United States v. Brittain*, 931 F.2d 1413, 1418 (10th Cir. 1991) (public utilities director for a city); *United States v. Frezzo Bros, Inc.*, 461 F. Supp. 266, 269 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3rd Cir. 1979) (president and secretary of family company), *cert. denied*, 444 U.S. 1074 (1980). *See United States v. MacDonald & Watson Waste Oil Co.*, 933 F.3d 35, 50 (1st Cir. 1991) ("[i]n order to prove that a person is a responsible corporate officer

. . . [f]irst, it must be shown that the person is an officer of the corporation, not merely an employee.")[7]

Further, the other courts of appeals that have upheld convictions under Section 1319(c)(6) have followed *Park* and have imposed criminal liability only where the defendant either had direct, personal supervisory responsibility over the specific corporate activities from which the illegal discharges occurred, or obtained actual awareness of possible violations of the CWA in systems subject to his ultimate control and failed to undertake appropriate investigations and corrective actions. For example, in *Brittain*, 931 F.2d 1418, 1420, the Tenth Circuit found that the defendant director of public utilities had been informed by the plant supervisor that it was discharging raw sewage, discussed the illegal discharges with the plant supervisor several times, and physically observed illegal discharges. In *Iverson*, 162 F.3d at 1018-1019, the defendant supervised the drum-cleaning operation that caused illegal discharges, personally discharged wastewater, and ordered company employees to make improper releases. Similarly, in *Frezzo Bros.*, 461 F. Supp. at 270, *aff'd*, 602 F.2d at 1125, 1129, the president and secretary of the company had direct knowledge of discharges through repeated contacts with regulatory officials; indeed, one of the brother-defendants also stated to regulatory officials that their pollution controls worked "95% of the time."

The conflict between the Fourth Circuit's decision and those of other courts of appeals that have applied the responsible corporate officer doctrine in environmental cases warrants review by this Court.

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[7] *Cf. Iverson*, 162 F.3d at 1022 n.6 (in upholding CWA conviction under responsible corporate officer theory, the Ninth Circuit noted that defendant did not raise the "officer" issue).

## III. The Decision Below Constitutes a Substantial Expansion in the Scope of Criminal Liability That Is Not Authorized by Congress.

The Court should grant the Petition in order to address the important legal question concerning the proper scope of the responsible corporate officer doctrine as a pathway for criminal liability in environmental cases. The Fourth Circuit's decision has improperly extended the scope of that liability in a manner not authorized by Congress.

Federal courts have had substantial difficulty in applying criminal law principles to the CWA, because of the breadth of its liability provisions. *See* R. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L. J. 2407, 2465-2484 (1995). This difficulty has lead to concerns that, unless the limiting principles within these doctrines are followed carefully, the combination of the negligence and responsible corporate officer doctrines could operate as a *de facto* strict liability doctrine.[8]

The Fourth Circuit has adopted an interpretation of the "duty of care" enforceable under the criminal negligence provision, through the diminished quantum of proof required for responsible corporate officer liability, that is broader than that adopted by any other court of appeals. It has improperly rewritten the CWA to fit the facts of this case.

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[8] *See* Hare, *Comment, Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. Pa. L. Rev. 933, 952-54 (1990):

> [T]he negligence concept and the "responsible corporate officer" concept . . . working in tandem, have the effect of exponentially increasing the scope of the negligence standard . . . Analytically, this theory of liability lies very close to a strict liability construct . . .

The CWA, as enacted by Congress, already afforded defendants few of the traditional protections against criminal liability. The statute imposes a minimal *mens rea* requirement; a broad definition of "pollutant;" a broad definition of "waters of the United States" (here, the enclosed pipes of a municipal wastewater treatment system); no minimum quantity necessary to trigger criminal liability; and no requirement of a showing of actual environmental harm. Under these circumstances, it is important that courts adhere to the limits on criminal liability that Congress did include in the CWA, so that its criminal liability provisions may be applied consistently with fundamental principles of justice.

This judicial restraint is especially important in light of the "severity of the penalty" that may be imposed under the CWA. *Hanousek*, 528 U.S. at 1103 (Thomas and O'Connor, JJ., dissenting from denial of certiorari). Here, Mr. Hong, a first time offender, was sentenced to three years imprisonment and a $1.3 million fine, for an alleged negligent failure to make certain that operational personnel, under the direct control of the plant manager, ran an established and permitted pollution control system in accordance with discharge limits. Under these circumstances, it is important that Federal courts adhere to the limiting principles that Congress and this Court have drawn, and not rely on the circular, subjective and sweeping basis for liability relied upon by the Fourth Circuit in this case.

For these reasons, the Court should grant the Petition and define the standards under which an individual may be held criminally liable under the environmental laws as a responsible corporate officer.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 5, 2001

# APPENDIX

**PUBLISHED**

# UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br><br>v.<br><br>JAMES MING HONG,<br>*Defendant-Appellant.* | No. 00-4335 |

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| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br><br>v.<br><br>JAMES MING HONG,<br>*Defendant-Appellant.* | No. 00-4462 |

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|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br><br>v.<br><br>JAMES MING HONG,<br>*Defendant-Appellant.* | No. 00-4502 |

UNITED STATES v. HONG

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge; David G. Lowe,
Magistrate Judge.
(CR-99-269)

Argued: December 8, 2000

Decided: March 8, 2001

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Before WILKINSON, Chief Judge, and WILKINS and KING, Circuit Judges.

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Affirmed in part, vacated in part, and remanded by published opinion. Judge Wilkins wrote the opinion, in which Chief Judge Wilkinson and Judge King joined.

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**COUNSEL**

**ARGUED:** John Fontana Cooney, VENABLE, BAETJER, HOWARD & CIVILETTI, L.L.P., Washington, D.C., for Appellant. John Staige Davis, V, Assistant United States Attorney, Michael R. Fisher, Special Assistant United States Attorney, Richmond, Virginia, for Appellee. **ON BRIEF:** Joseph G. Block, Gregory S. Braker, VENABLE, BAETJER, HOWARD & CIVILETTI, L.L.P., Washington, D.C., for Appellant. Helen F. Fahey, United States Attorney, Richmond, Virginia, for Appellee.

## OPINION

WILKINS, Circuit Judge:

James Ming Hong appeals his convictions and sentence for violating the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA). *See* 33 U.S.C.A § 1319(c)(1)(A) (West Supp. 2000). The Government cross-appeals, arguing that the district court erred in vacating the fine imposed by the magistrate judge who convicted and sentenced Hong and instructing the magistrate judge to impose a fine of no more than $25,000 each for 12 of Hong's 13 convictions. We conclude that Hong's challenges to his convictions and term of imprisonment are without merit but that the district court erred in vacating the fine initially imposed by the magistrate judge. Accordingly, we affirm in part, vacate in part, and remand for reimposition of the original fine.

I.

In September 1993, Hong acquired a wastewater treatment facility at Second and Maury Streets in Richmond, Virginia from Environmental Restoration Company, Inc. Hong initially operated the facility under the name ERC-USA but subsequently made several changes to the company name, eventually calling it Avion Environmental Group (Avion). Hong also moved the company's operations to a new facility on Stockton Street in Richmond. Hong avoided any formal association with Avion and was not identified as an officer of the company. Nevertheless, he controlled the company's finances and played a substantial role in company operations. For example, Hong negotiated the lease for the Stockton

Street facility,[1] participated in the purchase of a wastewater treatment system (discussed further below), reviewed marketing reports, urged Avion employees to make the company successful through the use of various marketing strategies, and controlled the payment of Avion's various expenses. Hong maintained an office at Avion from which he conducted business.

In late 1995, Hong and Robert Kirk, Avion's general manager, began to investigate the possibility of obtaining a carbon-filter treatment system for the Stockton Street facility, which lacked a system to treat wastewater. Hong and Kirk were specifically advised that the treatment system they were considering was designed only as a final step in the process of treating wastewater; it was not intended for use with completely untreated wastewater. Nevertheless, after purchasing the system, Avion used it as the sole means of treating wastewater. The system quickly became clogged. Hong was advised of the problem by Avion employees and inspected the treatment system himself on at least one occasion. Additionally, Bruce Stakeman, who sold the filtration media necessary for the system, advised Hong that the treatment system would not function properly unless it was preceded by an additional filtration mechanism. No additional filtration media were purchased, nor was an additional filtration system installed.

In May 1996, Avion employees began discharging untreated wastewater directly into the Richmond sewer system in violation of Avion's discharge permit. Untreated wastewater was discharged numerous other times during the remainder of 1996. Based on these activities, Hong

[1] Hong signed the lease for the Stockton Street facility as Avion's president.

subsequently was charged by information with 13 counts of negligently violating pretreatment requirements under the CWA. *See* 33 U.S.C.A. § 1319(c)(1)(A). More specifically, Hong was charged with one count of failing to properly maintain and operate a treatment system and with 12 counts of discharging untreated wastewater. Each count of the information alleged that Hong committed the violations "as a responsible corporate officer." *E.g.*, J.A. 19.

The case was tried before a magistrate judge, who found Hong guilty on all counts. The magistrate judge imposed a fine of $1.3 million—$100,000 for each count of conviction—and sentenced Hong to 36 months imprisonment. In calculating the appropriate term of incarceration, the magistrate judge first determined that Hong was subject to a sentencing range of 51-63 months pursuant to the sentencing guidelines. After departing downward four levels to a guideline range of 33-41 months, the magistrate judge concluded that the appropriate sentence under the guidelines was 36 months imprisonment. Because each of Hong's misdemeanor convictions provided a maximum penalty of one year, the magistrate judge imposed sentences of 12 months on Counts One, Two, and Three to be served consecutively to each other, and sentences of 12 months on the remaining counts to be served concurrently with each other and with the sentences for Counts One, Two, and Three. *See United States Sentencing Guidelines Manual* § 5G1.2(d) (1998).

Hong appealed to the district court, which affirmed his convictions and term of imprisonment but, based upon its conclusion that the maximum fine for each of Counts Two through Thirteen was $25,000, vacated the fine and remanded for imposition of a fine of no more than $300,000

on those counts. Hong now appeals his convictions and term of imprisonment, and the Government cross-appeals the reduction of the fine.

II.

The provision of the CWA under which Hong was convicted applies to "[a]ny person who" negligently violates pretreatment requirements. 33 U.S.C.A § 1319(c)(1)(A). The CWA defines "person" generally as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C.A. § 1362(5) (West 1986). For purposes of § 1319(c), "person" is further defined to include "any responsible corporate officer." 33 U.S.C.A. § 1319(c)(6) (West Supp. 2000). As noted previously, the information charged Hong with negligently violating pretreatment requirements "as a responsible corporate officer." *E.g.*, J.A. 19. Hong argues that the Government failed to prove that he was a responsible corporate officer. Specifically, he maintains that the Government failed to prove that he was a formally designated corporate officer of Avion and that, even if such proof was not required, the Government failed to prove that he exerted sufficient control over the operations of Avion to be held responsible for the improper discharges. We disagree with both contentions.

The "responsible corporate officer" doctrine was first articulated by the Supreme Court in *United States v. Dotterweich*, 320 U.S. 277 (1943). *See United States v. Iverson*, 162 F.3d 1015, 1023 (9th Cir. 1998). In *Dotterweich*, the president and general manager of a drug company argued that he could not be held criminally liable for the company's violations of the Federal Food, Drug, and

Cosmetic Act. *See Dotterweich*, 320 U.S. at 279. The Supreme Court rejected this contention, holding that all who had "a responsible share" in the criminal conduct could be held accountable for corporate violations of the law. *Id.* at 284; *see id* (explaining that "a corporation may commit an offense and all persons who aid and abet its commission are equally guilty").

The Court revisited the responsible corporate officer doctrine in *United States v. Park*, 421 U.S. 658 (1975). In elaborating on the concept of a "responsible share" in a violation that the defendant did not personally commit, the Court stated that the Government may satisfy its burden of proof by introducing "evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Park*, 421 U.S. at 673-74. The Court explicitly rejected the argument that the defendant must have brought the violation about through some "wrongful action." *Id.* at 673 (internal quotation marks omitted); *see Iverson,* 162 F.3d at 1025 ("Under the CWA, a person is a 'responsible corporate officer' if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.").

It is evident from these principles that the Government was not required to prove that Hong was a formally designated corporate officer of Avion. The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the

defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.[2]

Regarding that question, Hong contends that the Government failed to prove that his relationship to Avion was such that he possessed authority to prevent the illegal discharges. Ample evidence supports the magistrate judge's finding of guilt, however. The evidence indicated that although Hong went to great lengths to avoid being formally associated with Avion, in fact he substantially controlled corporate operations. Furthermore, Hong was involved in the purchase of the filtration system and was aware, in advance, that the filtration media would quickly be depleted if used as Hong intended. And, the evidence supported a finding that Hong was in control of Avion's finances and refused to authorize payment for additional filtration media. Finally, Hong was regularly present at the Avion site, and discharges occurred openly while Hong was present. Accordingly, we affirm Hong's convictions.

III.

Hong next challenges his sentence, maintaining that the three-year term of imprisonment imposed by the magistrate judge violates the Eighth Amendment prohibition against "cruel and unusual punishments," U.S. Const. amend. VIII,

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[2] This rationale is fatal to Hong's claim that the magistrate judge constructively amended the information by convicting Hong as an owner of Avion rather than as a responsible corporate officer. While the magistrate judge did conclude that Hong was the de facto owner of Avion, the finding of guilt was based on the magistrate judge's determination that the evidence regarding Hong's relationship to Avion demonstrated his responsibility for the discharges.

because it is grossly disproportionate to the crime committed, *see Solem v. Helm*, 463 U.S. 277, 284 (1983) (observing that the cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"). Because Hong failed to challenge his sentence on this basis before the magistrate judge or the district court, our review is for plain error. *See United States v. Olano*, 507 U.S. 725, 731-32 (1993).

This court has held that proportionality review is not available for any sentence less than life imprisonment without the possibility of parole. *See United States v. Polk*, 905 F.2d 54, 55 (4th Cir. 1990).[3] Even if we were to review Hong's claim, however, we would conclude that his sentence was not disproportionate and thus that no error occurred. Hong argues, essentially, that his sentence of three years is disproportionate because the criminal conduct consisted of the "negligent breach of a single duty of care." Brief of Appellant at 56. Hong's argument glosses over the fact that he was convicted of violating his duty of care not once, but *thirteen times*. The imposition of consecutive one-year terms of imprisonment for three of those convictions is not disproportionate. *See Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) (explaining that "[t]he Eighth Amendment analysis focuses on the sentence imposed for

[3] In arguing that his three-year sentence is disproportionate, Hong relies on two decisions of this court that left open the question of whether proportionality review is appropriate for sentences of less than life without the possibility of parole. *See Sutton v. Maryland*, 886 F.2d 708, 712 (4th Cir. 1989); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1985). *Polk* answered the question left open in *Sutton* and *Rhodes*.

each specific crime, not on the cumulative sentence for multiple crimes"), *cert. denied*, 121 S. Ct. 83 (2000).

IV.

On cross-appeal, the Government challenges the fine of $25,000 imposed on each of Counts Two through Thirteen,[4] maintaining that the district court erred in determining that the guidelines precluded application of the alternative fine statute, 18 U.S.C.A. § 3571 (West 2000). The Government's cross-appeal presents a question of guidelines interpretation, which we review de novo. *See United States v. Dawkins*, 202 F.3d 711, 714 (4th Cir.), *cert. denied*, 120 S. Ct. 1989 (2000).

The sentencing guidelines provide that a fine shall be imposed in all cases unless the defendant is unable to pay. *See* U.S.S.G. § 5E1.2(a). Generally, the amount of the fine is determined by reference to a table that specifies a minimum and maximum fine for each offense level. *See id.* § 5E1.2(c)(3). However, the guidelines also provide that the maximum fine set forth in the fine table "does not apply if the defendant is convicted under a statute authorizing... (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized *by the statute*." *Id.* § 5E1.2(c)(4) (emphasis added).

The parties agree that because the statute of conviction, 33 U.S.C.A. § 1319(c)(1), authorizes a fine for each day of violation, Hong is subject to a fine "up to the maximum authorized by the statute" pursuant to § 5E1.2(c)(4). Hong maintains, however, that the guideline language referring to

[4] The magistrate judge also imposed a fine of $100,000 on Count One. That fine is not challenged by either party.

"the maximum [fine] authorized by the statute" limits the potential fine to the maximum specified in the statute of conviction. Under this interpretation, the maximum fine for each of Counts Two through Thirteen is $25,000, as set forth in 33 U.S.C.A. § 1319(c)(1). The Government, in contrast, argues that § 5E1.2(c)(4) is properly understood as a directive that the guidelines do not provide any maximum fine when the statute of conviction authorizes a fine per day of violation. Under the Government's interpretation, the maximum fine for each of Counts Two through Thirteen is $100,00, as set forth in 18 U.S.C.A. § 3571.[5] The magistrate

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[5] The alternative fine statute, 18 U.S.C.A. § 3571, provides in pertinent part:

> *(b) Fines for individuals.*—Except as provided in subsection (e) of this section, an individual ... may be fined not more than the greatest of —
>
> (1) the amount specified in the law setting forth the offense; [or]
>
> . . .
>
> (5) for a Class A misdemeanor that does not result in death, not more than $100,000[.]
>
> . . .
>
> *(e) Special rule for lower fine specified in substantive provision.* —If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, *by specific reference*, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

18 U.S.C.A. § 3571 (emphasis added). In short, § 3571 provides that the maximum possible fine for a Class A misdemeanor of the type committed by Hong is $100,000 unless the statute of conviction—here, 33 U.S.C.A. § 1319(c)(1)—specifically precludes application of the alternative fine provision. Section 1319(c)(1) does not specifically preclude application of § 3571.

judge, believing the Government's position to be correct, imposed a total fine of $1.2 million on Counts Two through Thirteen. On appeal, the district court agreed with Hong that the maximum fine on each count was $25,000; accordingly, it vacated the fine imposed by the magistrate judge and remanded for imposition of a total fine on Counts Two through Thirteen no greater than $300,000.

We conclude that the interpretation of § 5E1.2(c)(4) by the district court was incorrect. In determining the meaning of the guideline, we are guided by the commentary to § 5E1.2, which specifically provides that "the guidelines do not limit maximum fines" when § 5E1.2(c)(4) applies. U.S.S.G. § 5E1.2, comment. (n.5); *cf. id.* comment. (n.2) (citing the alternative fine provision for the proposition that "[i]n general, the maximum fine permitted by law as to each count of conviction is...$100,000 for a Class A misdemeanor"). It is settled law that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). Here, we perceive no conflict between the guideline and the commentary. Rather, application note 5 explains the import of § 5E1.2(c)(4), namely, that the guidelines impose no limit on the maximum fine when the offense of conviction allows a fine per day of violation. We therefore vacate the fine and remand for reimposition of the fine initially imposed by the magistrate judge.

V.

In sum, we conclude that Hong was properly held criminally responsible for his role in failing to prevent

Avion's violations of the CWA and that the 36-month sentence imposed on Hong did not violate the Eighth Amendment. Accordingly, we affirm Hong's convictions and sentence. Because the district court erred in concluding that the maximum fine for each of Counts Two through Thirteen was $25,000, we vacate the fine and remand for reimposition of the original fine.

*AFFIRMED IN PART, VACATED IN PART, AND REMANDED*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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| UNITED STATES OF AMERICA | |
| v. | |
| | Criminal Action Number 3:99CR269 |
| JAMES MING HONG | |
| Defendant. | |

**MEMORANDUM OPINION**

THIS MATTER is before the Court on an Appeal of Magistrate Decision brought by Defendant JAMES MING HONG. Hong was convicted on April 30, 1999 for thirteen alleged violations of the Clean Water Act (herein "CWA") in a trial held before United States Magistrate Judge David G. Lowe. Hong asks that the Court reverse his conviction on all counts; in the alternative, he asks that Counts Two through Thirteen be reversed as multiplicitous, or that the sentence be vacated and remanded for resentencing. For the reasons discussed below, the Magistrate's Decision is AFFIRMED in part and REVERSED in part as follows:

1. All findings of guilt are AFFIRMED;

2. All findings on sentencing issues are AFFIRMED, except as noted below;

3. The 3-year term of imprisonment is AFFIRMED; and

4. The $1.3 million fine is REVERSED. The issue of an appropriate fine as to Counts Two through Thirteen is hereby REMANDED to the Magistrate for resentencing in accordance with the Memorandum Opinion.

## I. Background

At its core, this Appeal concerns a sole proprietor's liability for violations of the Clean Water Act (herein the "CWA") committed by a corporation. Hong was the sole proprietor of Avion Environmental Group, Inc. (herein "Avion"), a small, Richmond-based environmental company which was in business to "receive, treat and dispose of petroleum-contaminated industrial groundwater." (Appellee's Br. "Statement of Facts" § I(A).). Avion was formed in 1995 following Hong's 1993 acquisition of Environmental Restoration Company, a similar Richmond-based wastewater treatment company, later reorganized as ERC-USA and then as ERC-Richmond (herein collectively "ERC"). Id. § I(B).). The Government maintains that ERC committed numerous environmental violations under Hong's direction, eventually leading ERC to enter into an enforcement order with the Virginia Department of Environmental Quality. (Id.). Hong formed Avion in 1995, listing the chief operating officer of another Hong-owned company as Avion's sole director without her knowledge. Id. § I(C).). Hong was Avion's sole owner and director, although other individuals have been listed falsely at various

times as Avion officers and directors. (Id. § I(G).). While Hong's principal office was in Virginia Beach, Hong maintained an office at Avion in Richmond. (Id.). Hong also performed the following tasks, suggesting control over Avion: (1) he controlled and directed Avion's finances; (2) he directed Avion employees to perform personal services; (3) he led staff meetings on occasion; (4) he handled Avion's marketing; (5) he obtained insurance coverage for Avion (although he stated to insurers that Avion did not need pollution liability coverage); (5) he worked with attorneys on Avion's behalf to obtain a hazardous waste transporter permit; and (6) he controlled Avion's expenditures on waste treatment, which are detailed below. (Id.).

Soon after forming Avion, Hong explored the possibility of utilizing a polymerized carbon filter wastewater treatment system (herein the "treatment system") to conduct Avion's business; this treatment system required the owner to replace its filtration media on a periodic basis, lest it become clogged with impurities and shut down. (Id. § I(C).). The treatment system was designed to act as a "polishing agent, not a gross removal agent," meaning that it was not designed to handle totally untreated industrial wastewater. (Id.). The manufacturer of the treatment system informed Hong of these facts, and noted that the cost of replacing the filtration media constituted the principal expense of running the treatment system. (Id.). Hong ordered a treatment system, which was received by Avion on December 22, 1995. (Id.). Despite the manufacturer's warnings, Avion employed no additional means by which to process incoming industrial wastewater. (Id.). Hong later refused to pay the manufacturer for the treatment system or for the filtration media on various grounds (including that Avion had not yet received an industrial user permit from the City of Richmond, although Avion still refused to pay the

manufacturer after the permit had been granted), but Hong eventually paid for the treatment system only. (Id. §(E).). Hong spoke to his employees of using "charcoal" as a substitute for the filtration media, and suggested his daughter could "reverse-engineer" the media so that Avion would not have to purchase more from the manufacturer. (Id.).

The City of Richmond issued Avion an industrial user permit (herein the "permit") on November 15, 1995, authorizing the discharge of treated wastewater into Richmond's sanitary sewer system. (Id. § I(D).). The permit specified that all discharged wastewater was to be processed through Avion's treatment system, and it required Avion to "at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." (Id.). The permit also capped the levels of various pollutants that could be accepted into the sewer system, including benzene, toluene, ethyl benzene, and xylene (herein collectively "BTEX"), which was capped at 2.13 milligrams per liter of discharge. (Id.).

As a result of Hong's refusal to employ additional means of filtration and Hong's decision not to replace old filtration media, Avion's filtration system became overwhelmed by contaminants in the incoming industrial wastewater. (Id. § I(E).). Hong was informed of the treatment system's problems by Avion employees, and inspected it himself on at least one occasion in 1996. (Id.). Hong was informed directly by Bruce Stakeman, a filtration media salesman, of the need to employ an additional filter system (an oil-water separator) in conjunction with the existing treatment system; Stakeman also observed by letter that Avion was operating the treatment system improperly,

that contamination levels were too high, and that the waste stream passing through the treatment system was "heavy in sludge and particulates." (Id.). Despite these varied warnings, Avion continued to accept industrial wastewater from its customers. (Id.).

By May 1996, Avion employees began to discharge wastewater directly into the Richmond sewer system (predominantly at night) without bothering to send the wastewater through the treatment system at all; these discharges violated the permit limits on BTEX on at least three occasions. (Id.). The employees discharged the untreated wastewater using large hoses stretching across the Avion lot. (Id.). Hong was aware of the hoses, as he drove over them on at least one occasion and on another occasion he asked employees to move them so he could drive out. (Id.). Avion employees were caught in the act by a city official on August 26, 1996, and thereafter stopped recording the illegal discharges in the company's records. (Id.). These activities prompted at least one employee to resign in disgust, and by December 1996 only one employee—Robert Kirk—was willing to perform the discharges. (Id.). Despite these events, Hong still failed to purchase an oil-water separator, to replace old filtration media, to install a working flow meter to monitor discharge volume (as required by the permit), to transport wastewater offsite for treatment and disposal, or even to buy a business license. (Id. at § I(G).). When confronted in January 1997 by Julian Mills, Avion's new CFO, Hong acknowledged the problems but stated that charcoal could be used in the treatment system because it was cheaper than new filtration media. (Id. § I(G).).

Following the firing of Robert Kirk for alleged mismanagement on January 24, 1997, Avion obtained replacement filter media for the first time, although Hong

soon berated an Avion employee for testing storm water for contamination (in accordance with a state requirement), calling the requirement a "stupid law." (Id. § I(H).). Hong changed Avion's corporate name to Avion Biotechnology LLC in July 1997 in an apparent attempt to avoid creditors, and instructed Avion Biotechnology's registered agent—an Avion employee—to use the new name to avoid existing liabilities; this agent resigned soon thereafter. (Id.). Hong then decided to sell the business, and represented to the buyer that he "never had anything to do with Avion." (Id.). Hong sold the business in April 1998, and abandoned approximately 40,000-50,000 gallons of untreated waste at Avion's Richmond location, despite the pleas of the property owner. (Id.).

Hong was charged by Criminal Information on December 31, 1998 with thirteen pretreatment violations of the CWA, 33 U.S.C. § 1319(c)(1)(A). These counts are misdemeanor violations. Hong was found guilty on all counts on April 30, 1999. Based upon expert testimony, the trial court found that the discharges at issue involved toxic and hazardous pollutants, and accordingly applied United States Sentencing Guideline § 2Q1.2's base offense level of eight. (Appellee's Br. § II.). The trial court then departed downward two levels, despite finding that Hong had actual knowledge of the violations and that he was primarily responsible for them. (Id.). It then applied the following upward additions: (1) a six-level upward adjustment under § 2Q1.2(b)(1)(a) for an "ongoing, continuous, or repetitive discharge" into the environment; (2) a four-level upward adjustment for violating a permit pursuant to § 2Q1.2(b)(4); (3) a two-level upward departure under Application Note 8 of § 2Q1.2, in light of the volume and toxicity of the discharges at issue; (4) a four-level upward adjustment pursuant to § 3B1.1(a) based on Hong's role in the offense.

(Id.). The trial court departed downward by four to produce a Total Offense Level of 20, which results in a Sentencing Guidelines Range of 33-41 months. (Id.). The trial court sentenced Hong to 3 years of imprisonment and $1.3 million in fines. Hong brought this appeal on November 5, 1999.

## II. Standard of Review

On appeal from a Magistrate court's judgment of conviction, the district court sits solely as an appellate court. United States v. Moore, 586 F.2d 1029, 1032 (4th Cir. 1978); FED. R. CRIM. P. 58(g)(2)(D). When evidence is challenged as insufficient to support a conviction, the district court must determine whether the evidence would permit the Magistrate court to find the defendant guilty beyond a reasonable doubt, not whether the district court itself believes the defendant is guilty beyond a reasonable doubt. United States v. Fletcher, 344 F.Supp. 332, 335 (E.D. Va. 1972). Factual determinations made by the Magistrate court may be overturned on appeal only if clearly erroneous. United States v. Jerge, 738 F.Supp. 181 (E.D. Va. 1990). "On appeal, evidence is sufficient to sustain a guilty verdict if, construed most favorably to the prosecution, the evidence furnished the trial court sufficient basis to find the defendant guilty beyond a reasonable doubt." United States v. Williams, 405 F.2d 14, 17 (4th Cir. 1968). The district court must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the United States. Jerge, 738 F.Supp. at 183. Questions of law will be reviewed *de novo*. United States v. Cade, 2000 WL 204048 (4th Cir.) (slip opinion)(unpublished); United States v. Hicks, 948 F.2d 877, 880 (4th Cir. 1991). Whether an indictment or information is multiplicitous is therefore reviewed *de novo*. United States v. Mancuso, 42 F.3d 836, 847 (4th Cir. 1994).

A district court reviewing the imposition of a sentence by a Magistrate court must determine whether the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the Sentencing Guidelines; (3) imposes a greater fine, term of imprisonment or term of supervised release than the maximum established in the Guidelines and/or agreed to by the parties pursuant to a Plea Agreement; or (4) was imposed for an offense for which no sentencing guideline has been issued and is greater than the sentence specified in a plea agreement. 37 U.S.C. §§ 3742(a)(1)-(4). A trial court's factual findings with respect to the imposition of a fine are upheld unless clearly erroneous. United States v. Aramony, 166 F.3d 655, 665 (4th Cir. 1999).

## III. Analysis

Four issues lie at the heart of Hong's appeal: (1) whether the Magistrate court erred in holding Hong liable under the Clean Water Act; (2) whether the Criminal Information is multiplicitous; (3) whether the Magistrate court erred in imposing the term of imprisonment; and (4) whether the Magistrate court erred in imposing the fine. These four issues are addressed in turn.

### A. Whether the Magistrate Court Erred in Holding Hong Liable Under the CWA

The CWA imposes liability upon "any person" who violates its provisions. 33 U.S.C. § 1319(c)(1). A "person" can include any entity defined as such under 33 U.S.C. §

1362(5)[1] or any "responsible corporate officer." 33 U.S.C. § 1319(c)(3). Neither the CWA nor binding case law from the Fourth Circuit appear to define the term "responsible corporate officer" (herein "RCO"), but a reasonable examination of the term in its CWA context demonstrates that a person must possess one or more of the following attributes in order to be held liable as a RCO: (1) some degree of control over the finances of the polluting entity; (2) the authority to manage one or more employees; (3) the power to negotiate on behalf of the polluting entity; and/or (4) the power to make binding commitments on behalf of the polluting entity. Individuals who exhibit one or more of these indicia of RCO status are in the best position to know of actual or potential violations of the CWA, and/or to prevent such violations from occurring. The evidence adduced at trial demonstrates that Hong exhibited all four attributes of RCO status, and therefore the Court cannot say that the Magistrate's finding of liability under the CWA was clearly error. This finding shall therefore not be disturbed.

Hong argues at length that he cannot be held liable as a RCO because he was never an officially-designated corporate officer of Avion, but this argument eviscerates the CWA liability scheme. Permitting a defendant who functions as a responsible corporate officer to conceal his actual corporate role through creative manipulation of a company's organizational chart encourages violators to escape CWA liability through fraud. Envisioning such a ploy takes no great leap of imagination, as the Magistrate found that Hong himself attempted to mask his true role at Avion by falsely listing various individuals as officers and

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[1] 33 U.S.C. § 1362(5) defines "person" to include "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

directors of Avion (including the chief operating officer of another Hong-owned company, who was listed as Avion's sole director without her knowledge). For these reasons, the Court holds that the "RCO" designation looks to an individual's authority and actions, not to an individual's specific title or position on an organizational chart. The Magistrate's finding of liability must therefore be upheld, as the evidence at trial clearly showed that Hong was a RCO, and that as such he knew or should have known of the illegal discharges.

**B. Whether the Criminal Information was Multiplicitous**

The next issue before the Court is whether the thirteen-count Criminal Information was multiplicitous and thus invalid for reasons of double jeopardy. Although Hong mounts a multi-faceted attack upon the Criminal Information, a *de novo* review of the Criminal Information demonstrates that the counts charged are not multiplicitous of one another and therefore must stand. Three findings support this conclusion. First, although all thirteen counts allege various pretreatment violations of the CWA occurring between April and December of 1996, Counts Two through Thirteen concern different permit provisions than does Count One, and thus are not multiplicitous of Count One. Count One charges that Hong "negligently caused the failure properly to operate and maintain the facilities and systems of control that were installed and used to achieve compliance with Avion's permit." (Compl. Count One.). This count arises primarily from Hong's failure to replace the original filtration media. By contrast, Counts Two through Thirteen do not concern improper maintenance of the treatment system in violation of the permit, but rather the illegal discharges of untreated wastewater in violation of the

permit's requirement that all wastewater "be pretreated and discharged through the filtration and polymerized carbon system." In other words, Count One concerns improper maintenance of the treatment system, whereas Counts Two through Thirteen concern improper use (or disuse) of the treatment system. (See generally Compl. Counts One through Thirteen.).

The Court finds also that Counts Two through Thirteen involve discharges that occurred over multiple days; these amount to different offenses and therefore not multiplicitous of one another. The Government notes wisely that to find otherwise would defeat both Congressional intent and valid public policy. (Appellees' Br. "Argument" § II.). By structuring the CWA to permit liability per day of violation, Congress clearly intended to punish violations individually, not in the aggregate. (Id.). This structure permits liability to be tailored to the misdeeds of a particular defendant, imposing greater punishment and more effective deterrence upon those defendants who commit CWA violations that are comparatively frequent or more severe than those committed by a one-time, accidental offender. Such a scheme is also required out of basic fairness, for it would be unjust to punish a defendant whose negligence results in a single minor violation the same way society punishes a defendant whose flagrant, deliberate environmental misdeeds result in much greater harm. The evidence introduced at trial is sufficient to support a finding that Hong falls in the latter category.

The Court finds also that the evidence introduced at trial was sufficient to support a finding that Hong was the proximate cause of each violation. The harm involved was clearly to foreseeable to Hong—he had heard the warnings, he had decided not to replace the filtration media, he had

chosen not to buy additional filter systems, and he withheld funds from his subordinates that could have been used for these purposes. (Appellee's Br. "Argument" § I(B).). The trial court therefore had sufficient evidence before it to find that Hong was the proximate cause of each violation.

For these reasons, the Court finds that the Criminal Information was not multiplicitous.

### C. Whether the Trial Court Erred in Imposing Hong's Term of Imprisonment

The third issue before the Court is whether the term of imprisonment imposed by the trial court was in error. Hong argues that the term of incarceration imposed by the Magistrate Court was excessive, and argues that it repeatedly misapplied the Sentencing Guidelines in calculating this sentence. (Appellant's Br. § IV.). Contrary to these assertions, there is sufficient evidence in the record to support the trial court's findings of fact, its application of the Sentencing Guidelines, and each of its decisions to depart from those Guidelines. The 3-year term of imprisonment imposed below shall therefore not be disturbed.

The Court looks first to the trial court's characterization of the discharges at issue in this case. Hong argues that the trial court wrongly characterized these discharges as "toxic" or "hazardous" in order to find a Base Offense Level of 8 under § 2Q1.2(a). (Id. § IV(A)(1).). Hong maintains that these discharges qualify as "oil" under the CWA and thus do not merit an upwards adjustment in Hong's base offense level. (Id.). According to Hong, the Government's witnesses acknowledge that the discharge limits found in the permit do not establish hazardous levels *per se*, but merely were based upon the capability of existing

technology to detect quantities of BTEX in the wastewater. (Id.). Hong contends that the discharges at issue here would not qualify as hazardous under either RCRA or CERCLA (a.k.a. "Superfund"), two comparable statutes dealing with the remediation of hazardous waste, or under the Clean Air Act. (Id. §§ IV(A)(2),(3).).

These arguments miss the mark. Sentencing Guideline § 2Q1.2 hinges upon whether a given substance has been classified as "hazardous" or "toxic"; if so classified, § 2Q1.2 provides a Base Offense Level of 8 and permits the trial court to adjust upwards. U.S. SENTENCING GUIDELINES MANUAL §§ 2Q1.2(a),(b) (1998). Application Note 1 to § 2Q1.2 states that "[t]his section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation." Id., Application Note 1. As demonstrated at trial, BTEX (or any solution or substance containing BTEX) has been designated as hazardous by the EPA in regulations adopted pursuant to the CWA, 33 U.S.C. § 1319(c)(2)(A). (Appellee's Br. "Argument" § III(A).). The criteria for application of a Base Offense Level of 8 were therefore satisfied; the trial court need not have looked afield to either RCRA or CERCLA, for regulations applying the CWA itself treat BTEX or any BTEX-ridden substance as hazardous. The discharges were therefore classified appropriately, permitting the imposition of a Base Offense Level of 8 pursuant to § 2Q1.2.

The Court looks next to the trial court's imposition of a six-level increase in Hong's Base Offense Level for an "ongoing, continuous, or repetitive discharge" into the environment, pursuant to § 2Q1.2(b)(1)(A). Hong argues that the increase was improper, because (1) it assumes that hazardous substances escaped the sewer system and entered

the environment, of which there is no evidence; (2) John Handzo, the Environmental Compliance Director for the Richmond sewer system, could not identify any such contamination other than to the sewer system; (3) it permits a 6-level increase for most cases involving chemicals, because most chemicals will volatize into the air even if no discharge occurs; and (4) the majority rule in these cases is to apply such an increase only in the event of an actual discharge. (Appellant's Br. § IV(B).).

While Hong argues to the contrary, the Court finds that the record contains sufficient evidence of ongoing, continuous or repetitive discharges to the environment to support the six-level increase under § 2Q1.2(b)(1)(A). Hong essentially asks the Court to accept one of three equally untenable positions: (1) that substances discharged into a sewer system do not or cannot progress to the environment at large; (2) that substances discharged into a sewer system cannot have an environmental impact beyond the sewer system; or (3) that a sewer system is not "the environment" for sentencing purposes, and therefore violators should incur no additional penalty if they choose to discharge illegally into a sewer. None of these positions makes intuitive sense, nor are they supported by the record. Without entering into an extensive factual inquiry as to the nature of modern sanitation systems, the Court finds it reasonable to believe that certain hazardous or toxic substances may pose an environmental threat even when discharged into a sewer. Nor does Hong offer any evidence to suggest that the U.S. Sentencing Commission meant to distinguish illegal discharges to sewer systems from such discharges to the "environment," even if Application Note 5 to § 2Q1.2 calls for proof of "actual" contamination. See U.S. SENTENCING GUIDELINES MANUAL § 2Q1.2(b)(1)(A), Application Note 5 (1998). The evidence presented at trial

demonstrates that Avion discharged its untreated wastewater directly into the sewer system (where it would enter the general waste stream), and that this untreated wastewater contained a substance classified as hazardous or toxic by the EPA. This evidence was therefore sufficient to justify the trial court's imposition of a six-level increase under § 2Q1.2(b)(1)(A). The fact that all chemicals may volatize into the air is of no consequence, for proof of actual contamination is not required under the law of this circuit. The Court finds no "majority rule" requiring proof of actual contamination, contrary to Hong's assertion. The trial court's imposition of a six-level increase shall therefore not be disturbed.

The Court looks next to whether a four-level increase in Hong's Base Offense Level pursuant to § 3B1.1(a) was appropriate based upon his aggravating role in the offense. Hong argues that such an increase is improper because these offenses were acts of omission; Hong argues that mere management of others who violate the law does not make the manager liable in an aggravating role. (Appellant's Br. § IV(D).).[2] There is ample evidence in the record to suggest

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[2] Though Hong's assessment of the criteria for upwards adjustment under § 3B1.1 is not dispositive as to whether the trial court's adjustment under this Guideline must stand, it should nevertheless be noted that Hong interprets § 3B1.1 incorrectly. Application Note 2 to § 3B1.1 recognizes that "[a]n upward departure may be warranted...in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised significant management responsibility over the property, assets or activities of a criminal organization." Id., Application Note 2. Application Note 2 demonstrates therefore that upon sufficient evidence, a trial court may indeed apply a four-level increase to those defendants who were "merely managing" others who violate the law. This contrasts with Hong's assertion that mere managers could not possible qualify for an upwards adjustment under § 3B1.1. This point is rendered moot by the volume of evidence

that he has utterly mischaracterized his role in these offenses, and upon which the trial court could have found that Hong played an aggravating role. § 3B1.1 permits a court to apply a four-level increase to a defendant's base offense level if the court finds that the defendant played an aggravating role in the offense, which can include serving as an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (1998). The record demonstrates that Hong directed Avion employees to break the law, and that he reacted with disdain when Avion employees attempted to comply with the law (such as by berating an Avion employee for testing storm water for contamination as required under state law, calling the requirement a "stupid law"). These actions satisfy the criteria under § 3B1.1(a) for an "aggravating" role. For all of these reasons, the Court finds that the four-level increase applied by the trial court pursuant to § 3B1.1(a) falls squarely within the discretion of the trial court, and shall therefore be affirmed.

The Court turns finally to whether the trial court erred in applying a two-level upwards adjustment pursuant to Application Note 8 to § 2Q1.2 and/or Application Note 7 to § 2Q1.3, based upon the volume of the discharges and upon their toxicity. Both Application Note 8 to § 2Q1.2 and Application Note 7 to § 2Q1.3 provide that in pollution cases involving permit violations, a trial court may depart upwards or downwards "[d]epending upon the nature and quantity of the substance involved and the risk associated with the offense." U.S. SENTENCING GUIDELINES MANUAL §§ 2Q1.2, Application Note 8; 2Q1.3, Application Note 7

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presented at trial demonstrating that Hong broke the law and directed others to do the same.

(1998). The Government presented evidence at trial of repeated discharges (at great quantities) of untreated wastewater, which contained quantities of a substance classified as "hazardous" by the EPA. Such evidence is sufficient to support a finding by the trial court that the discharges were sufficiently great and hazardous as to merit an upwards adjustment in Hong's Base Offense Level. The Court therefore—cannot say that this adjustment was clearly erroneous, so it shall not be disturbed.

In sum, the Court holds that the trial court applied the Sentencing Guidelines correctly in calculating Hong's sentence, and that any departures or adjustments from Hong's Base Offense Level were construed or applied properly. The 3-year term of imprisonment, which results from three of the thirteen counts receiving consecutive sentence treatment, is not excessive based on the facts of this case.

**D. Whether the Trial Court Erred in Imposing a Fine Upon Hong**

The final issue before the Court on this appeal is whether the Magistrate erred in imposing the fine in this case. The Court finds that the imposition of a $1.3 million fine is not legally supportable. This fine appears to have been calculated by multiplying the maximum fine allowable for a Class "A" misdemeanor under 18 U.S.C. § 3571(b)(5) ($100,000) by the thirteen counts of conviction, to produce a total fine of $1.3 million. This figure exceeds the applicable fine table in the Sentencing Guidelines, which offers a fine range of $7,500 to $75,000 for a Total Offense Level of 20. Id. § 5E1.2(c)(3). The Court's inquiry does not stop there, however, because Sentencing Guideline § 5E1.2(c)(4) permits a trial court to depart from the fine table if the

relevant statute authorizes a fine per day of violation. Id. § 5E1.2(c)(4). In such cases, the trial court is allowed to impose a fine up to the maximum figure authorized by the statute, even if that figure exceeds the applicable range in the fine table. Id. The CWA does indeed authorize a fine per day of violation, ranging anywhere from $2,500 to $25,000. 33 U.S.C. § 1319(c)(1). Since Counts Two through Thirteen pertain to only one day of violation each, the maximum fine permitted for each of those counts is $25,000. Count One differs from the remaining counts, in that it alleges a continuing violation over approximately six months. As noted above, the maximum fine allowed for any Class "A" misdemeanor is $100,000. Therefore, the trial court's imposition of a $100,000 fine for Count One is supported by law and is therefore affirmed.

This case is remanded to the trial court for resentencing solely as to the appropriate fines for Counts Two through Thirteen. The Magistrate is instructed that $300,000 is the uppermost limit for the total fines for Counts Two through Thirteen, as calculated by multiplying the $25,000 maximum fine by twelve counts of conviction. All other findings by the Magistrate are affirmed.

## IV. Conclusion

For the reasons discussed above, the Magistrate's Decision is AFFIRMED in part and REVERSED in part as follows:

5. All findings of guilt are AFFIRMED;

6. All findings on sentencing issues are AFFIRMED, except as noted below;

7. The 3-year term of imprisonment is AFFIRMED; and

8. The $1.3 million fine is REVERSED. The issue of an appropriate fine as to Counts Two through Thirteen is hereby REMANDED to the Magistrate for resentencing in accordance with the Memorandum Opinion.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

6 APR 2000
DATE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | |
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| UNITED STATES OF AMERICA | ) |
| | ) |
| v. | ) |
| | ) |
| | ) Criminal Action |
| | ) Number 3:99CR269 |
| | ) |
| JAMES MING HONG | ) |
| | ) |
| Defendant. | ) |

**FINAL ORDER**

THIS MATTER is before the Court on an Appeal of the Magistrate's Decision brought by Defendant JAMES MING HONG. For the reasons discussed in the accompanying Memorandum Opinion, the Magistrate's Decision is AFFIRMED in part and REVERSED in part as follows:

1. All findings of guilt are AFFIRMED;

2. All findings on sentencing issues are AFFIRMED, except as noted below;

3. The 3-year term of imprisonment is AFFIRMED; and

4. The $1.3 million fine is REVERSED. The issue of an appropriate fine as to Counts Two through Thirteen is hereby REMANDED to the Magistrate for resentencing in accordance with the Memorandum Opinion.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

6 APR 2000
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF

v. Criminal No:
3 : 98-591M

JAMES M. HONG,

DEFENDANT.

Before: THE HONORABLE DAVID G. LOWE, JUDGE

VOLUME 1

DAY 3 OF 3

APRIL 30, 1999

Richmond, Virginia

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On behalf of the PLAINTIFF

BRENNER, DOHNAL, EVANS & YOFFY
By: DENNIS W. DOHNAL, ESQUIRE

On behalf of the DEFENDANT

**EXCERPTS FROM TRANSCRIPT**
**(4TH CIRCUIT JOINT APPENDIX, PAGES 990-993)**

* * * * * *

THE COURT: All right. I don't have any problem with the basics of this case. I do not have any doubt that Mr. Hong was not just an investor. He was an owner, pure and simple, whether you want to call it de facto or de jure. This is a man who set this whole operation into being, along with Mr. Kirk. He managed it with Mr. Kirk. They went together to look at filtration systems. They went to bring it back. They both knew about the need for an oil separator. No, I'm sorry, this is not an investor who just simply had a lien on the property. This is an investor in the sense that he took an actual active participation in the operation of these entities. And to that extent, I find that he's liable under the law.

My problem comes with finding him guilty of each separate instance, because in each separate instance, I have to find guilt beyond a reasonable doubt. And I say this, Mr. Dohnal, because I assume you are going to appeal it, so you know exactly where I'm coming from. I am interpreting the statute to mean that once the owner puts the machinery into place and then negligently permits the operation of the company to discharge the effluence into the sewer system in violation of the permit, he's responsible for each separate discharge while he's in charge of the company, whether or not he's present on the premises. I have no doubt that Mr. Hong knew what was happening was wrong, he knew that he had not supplied the filtration system that was required. He did not supply the filter, the oil separator that was required. And he walked by that filter unit every time he went up to his office. And Mr. Tate, Mr. Morgan, everybody who

worked there got disgusted and left. From the one picture I saw, I don't blame them. All right.

Stand up please, Mr. Hong. Mr. Hong, upon the evidence before the Court, the Court finds you guilty of count one; finds you guilty of count two; finds you guilty of count three; finds you guilty of count four; finds you guilty of count five, and it finds you guilty of count six; finds you guilty of count seven; finds you guilty of count eight; it finds you guilty of count nine; finds you guilty of count ten; finds you guilty of count eleven; finds you guilty of count twelve; finds you guilty of count thirteen. I'm going to need a pretrial or presentence report, obviously, and I think we're 75 days now, if I'm correct, to get one.

MR. DOHNAL: Could Mr. Hong be seated?

THE COURT: Yes. You may be seated, Mr. Hong.

MR. DOHNAL: Do you want to pick that date now, Your Honor?

THE COURT: Yes.

THE CLERK: July 14?

MR. DOHNAL: I'm sorry?

THE CLERK: July 14?

MR. DOHNAL: Yes, ma'am.

THE COURT: July 14th.

MR. DOHNAL: Yes, sir.

THE COURT: Is the defendant on bond?

MR. DOHNAL: Yes, sir, he is.

THE COURT: Will be continued on the same bond, yes?

MR. DAVIS: Your Honor, I am not familiar with the conditions of bond, and I should be.

THE COURT: He has a passport. It's going to be turned in.

MR. DAVIS: I would ask that the passport be turned in.

MR. DOHNAL: It already has been turned in.

THE COURT: That takes care of that. That's all we need. Other than that, he's out on bond. All right. Thank you. Stand in recess.

(Proceedings concluded at 4:14 p.m.)

REPORTER'S CERTIFICATE

I, SALLY VALENTINE QUALLS, shorthand reporter, do hereby certify that the pages contained herein accurately reflect the notes taken by me, to the best of my ability, in the above-styled action.

/s/
SALLY VALENTINE QUALLS
Shorthand Reporter

## RELEVANT CLEAN WATER ACT PROVISIONS

### 33 U.S.C. §§ 1319(c)(1) AND (c)(6)

**(c) Criminal penalties**

**(1) Negligent violations**

Any person who-

**(A)** negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

**(B)** negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

* * * * * *

**(6) Responsible corporate officer as "person"**

For this purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

* * * * * *

**33 U.S.C. §§ 1342(a)(3) and (b)(8)**

**(a) Permits for discharge of pollutants**

**(3)** The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * * * *

**(b) State permit programs**

**(8)** To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new

introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works;

* * * * * *

**33 U.S.C. § 1362(5)**

**(5)** The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

Supreme Court, U.S.
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No. 00-1867

# In the Supreme Court of the United States

JAMES MING HONG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner was properly convicted as a "responsible corporate officer" for misdemeanor violations of the Clean Water Act, see 33 U.S.C. 1319(c)(6), where the evidence demonstrated that he controlled the company, exercised the powers of a corporate officer or director even though he avoided being formally identified as such, and was personally involved in the actions that caused the violations for which he was convicted.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 242 F.3d 528. The opinion of the district court (Pet. App. 14a-34a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 8, 2001. The petition for a writ of certiorari was filed on June 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Section 2 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 860, as amended, Clean Water Act of 1977 (Clean Water Act or CWA), Pub. L. No. 95-217, § 67(c)(2), 91 Stat. 1606, 33 U.S.C. 1319(c), authorizes criminal penalties

against any person who violates, *inter alia*, any requirement imposed in a pretreatment program approved under 33 U.S.C. 1342(a)(3) or (b)(8). For negligent violations, the Clean Water Act provides for punishment by a fine of not less than $2500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. 33 U.S.C. 1319(c)(1). The CWA generally defines the term "person" to include "an individual, corporation, partnership, association, State, municipality, or political subdivision of a State, or any interstate body." 33 U.S.C. 1362(5). The CWA further provides that for purposes of the criminal penalty provisions of Section 1319(c), "the term 'person' means, in addition to the definition contained in section 1362(5) of [Title 33], any responsible corporate officer." 33 U.S.C. 1319(c)(6).

2. In 1993, petitioner acquired Environmental Restoration Company, Inc. (ERC), a wastewater treatment business located in Richmond, Virginia. ERC received, stored, treated, and disposed of petroleum-contaminated industrial wastewater. ERC was later reorganized into several corporations that successively took over ERC's business; the last such corporation was Avion Environmental Group, Inc. (Avion), which was created in 1995. Petitioner shortly thereafter moved Avion to a new location on Stockton Street that lacked a water treatment system. Pet. App. 3a-4a, 15a.

Petitioner and Robert Kirk, Avion's general manager, traveled to Indiana to investigate the possible purchase of a carbon-filter wastewater treatment system manufactured by No-Char, Inc. No-Char officials told petitioner and Kirk that the treatment system was intended for use only as the final stage of the wastewater treatment process and was not designed for use with completely untreated wastewater. Petitioner was

also informed that subsequent purchases of additional filtration media for the treatment system would be needed to permit continued operation, and that buying the additional media was the principal expense of running the treatment system. Avion nevertheless used the system as the sole means of treating wastewater and did not purchase additional filtration media. C.A. App. 335-336; Pet. App. 4a.

After the company moved to Stockton Street in November 1995, petitioner expressed an interest in buying a stand-alone treatment unit. Petitioner was informed that the system he intended to purchase would be less effective when used without an oil-water separator to reduce contamination levels before treatment in the filter unit. Petitioner nevertheless ordered the system without an oil-water separator, and he put no separator in place. On November 15, 1995, the City of Richmond issued Avion an industrial user permit authorizing and regulating Avion's discharge of treated wastewater into Richmond's wastewater system. In March 1996, Avion received an amended permit that governed its discharges during the period of the offenses involved in this case. The permit mandated proper operation and maintenance of the filter system, and it required that all wastewater transported to Avion be pretreated and discharged through that system. The permit also limited BTEX (benzene, toluene, ethyl benzene, and xylenes) concentrations in Avion's discharges to 2.13 milligrams per liter. C.A. App. 272-276, 1337, 1405-1406, 1425.

Throughout 1996, petitioner tightly limited the company's expenditures. Notwithstanding Kirk's frequent complaints about the lack of funding, petitioner failed to purchase an oil-water separator for Avion, to buy media for the filter system, to install a working flow meter to

monitor the volume of discharges (which was required by Avion's permit), to transport wastewater offsite for proper treatment and disposal, and even to buy a business license. C.A. App. 136, 141, 187, 307, 679, 720-723, 851-853.

With no preliminary treatment by an oil-water separator, the filter system's media were quickly overwhelmed by the highly contaminated wastewater that was run through the system. C.A. App. 124-125, 421. The filters clogged, and the media jelled and became rubberized. *Id.* at 125, 193, 278. At a company meeting in early 1996, an Avion employee told petitioner that the system was a polishing unit, and that it required an oil-water separator to precede it. *Id.* at 270, 273-274. Although petitioner promised employees that more media would be obtained, none were, and by mid-April 1996 it was common knowledge at Avion that the system did not work. *Id.* at 125-126. In May 1996, the Avion employees began to bypass the treatment system, discharging untreated wastewater directly into the Richmond sewer system. Pet. App. 4a. The parties have stipulated that 12 discharges of untreated wastewater occurred between May 17 and December 10, 1996. C.A. App. 1327. Each of those discharges violated the requirement that the company release only treated wastewater, and the three discharges that were sampled and tested—on May 17, May 23-24, and August 26, 1996—violated the BTEX limitation in Avion's permit (one measured 67 times the limit). *Id.* at 1327, 1450.

3. Avion had no board of directors. C.A. App. 639, 718, 810. Petitioner regularly worked on Avion's premises, talking on the telephone and assigning typing projects to the staff, and he was listed on the company's employee telephone directory; Avion employees knew him as the owner of the company. *Id.* at 114-115, 140-

141, 181-182, 287, 291-292, 488, 671, 835. Petitioner received weekly reports on Avion's revenues and expenses, and he controlled Avion's finances. *Id.* at 204, 220, 289, 847, 858.

Petitioner concealed his control of Avion. Robert Kirk was variously identified as the company's general manager, president, vice-president, and chief operating officer. C.A. App. 883-884, 896. Petitioner instructed longtime Avion employee Ron Thompson not to give petitioner's telephone number to debt collectors, on the ground that petitioner was a "secured lender" rather than the owner of the company. *Id.* at 129. Petitioner directed an accountant to prepare unsigned memos from Avion's nonexistent "Board of Directors." *Id.* at 736-739. In April 1998, after an accountant sent petitioner a tax update regarding Avion, petitioner angrily called the accountant and told her that he was not responsible for Avion, that she was leaving a "paper trail" from him to Avion, and that she should dispose of all of her correspondence to petitioner regarding Avion's taxes. *Id.* at 622-624.

4. Petitioner was charged with 13 misdemeanor violations of the Clean Water Act's "pretreatment" provisions. Count One alleged that petitioner, as a "responsible corporate officer," had negligently failed to properly operate and maintain a filter system used to comply with an industrial user permit issued to Avion by the Richmond Division of Wastewater Treatment. Counts Two though Thirteen charged that on specific dates between May and December 1996, petitioner, as a "responsible corporate officer," had violated Avion's permit by negligently causing discharges of untreated wastewater into the Richmond sewer system. Pet. App. 4a-5a, 23a-24a.

The case was tried before a federal magistrate judge, who found petitioner guilty on all counts. See Pet. App. 5a, 19a. The magistrate judge concluded that petitioner was "not an investor who just simply had a lien on the property. This is an investor in the sense that he took an actual active participation in the operation of these entities. And to that extent, I find that he's liable under the law." *Id.* at 37a. The court also found that petitioner "knew what was happening was wrong, he knew that he had not supplied the filtration system that was required." *Ibid.* At sentencing, the magistrate judge "specifically f[ou]nd that [petitioner] had actual knowledge of the violations and indeed, that he was primarily responsible for the discharges and violations of the permit." C.A. App. 1095-1096. The magistrate judge sentenced petitioner to 36 months' imprisonment and imposed a $1.3 million fine ($100,000 on each of the 13 counts of conviction). Pet. App. 5a, 20a.

5. Petitioner appealed his convictions and sentences to the district court pursuant to 18 U.S.C. 3402. The district court affirmed the magistrate judge's findings of guilt, as well as the three-year term of imprisonment, and the $100,000 fine on Count One. Pet. App. 30a-32a. The district court found, *inter alia*, that petitioner was Avion's "sole proprietor" and its "sole owner and director," and it characterized petitioner's crimes as "flagrant, deliberate environmental misdeeds." *Id.* at 15a, 24a. The court rejected petitioner's argument that "because he was never an officially-designated corporate officer of Avion," he could not be held criminally liable as a responsible corporate officer. *Id.* at 22a. The court explained that "[p]ermitting a defendant who functions as a responsible corporate officer to conceal his actual corporate role through creative manipulation of a company's organizational chart encourages vio-

lators to escape CWA liability through fraud." *Ibid.* The court concluded, however, that the maximum total fine on Counts Two through Thirteen was $300,000, and it remanded the case to the magistrate judge for redetermination of the appropriate fine on those counts. *Id.* at 31a.

6. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-13a. Petitioner contended that he was not subject to criminal liability because he was not a "responsible corporate officer" within the meaning of 33 U.S.C. 1319(c)(6). The court of appeals discussed this Court's decisions in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Park*, 421 U.S. 658 (1975), and it concluded that

> the Government was not required to prove that [petitioner] was a formally designated corporate officer of Avion. The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether [petitioner] bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.

Pet. App. 7a-8a.

Examining the record of petitioner's trial, the court of appeals held that "[a]mple evidence supports the magistrate judge's finding of guilt." Pet. App. 8a. The court observed that "although [petitioner] went to great lengths to avoid being formally associated with Avion, in fact he substantially controlled corporate operations." *Ibid.* The court noted as well that petitioner "was aware, in advance, that the filtration media would quickly be depleted if used as [petitioner] intended," but that petitioner nevertheless "refused to

authorize payment for additional filtration media" even though he controlled Avion's finances. *Ibid.* Finally, the court explained that petitioner "was regularly present at the Avion site, and discharges occurred openly while [petitioner] was present." *Ibid.*[1]

**ARGUMENT**

Petitioner contends that he was not a "responsible corporate officer" within the meaning of 33 U.S.C. 1319(c)(6) because (1) he has not been formally "designated as a *de jure* officer of the company" (Pet. 19), and (2) he did not have sufficiently direct personal control over the plant conditions that led to the violations at issue here (Pet. 20-21). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Although the CWA does not define the term "responsible corporate officer," that term appears to have been drawn from cases beginning with this Court's decision in *United States* v. *Dotterweich*, 320 U.S. 277 (1943). In *Dotterweich*, a corporate president was convicted of misdemeanors after the corporation shipped misbranded and adulterated drugs in interstate commerce. *Id.* at 278. The Court rejected the

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[1] Petitioner also contended that the three-year prison term violated the Eighth Amendment prohibition against cruel and unusual argument. The court of appeals rejected that argument (see Pet. App. 8a-10a), and petitioner does not renew it here. Petitioner also does not seek review of the court of appeals' determination (see *id.* at 10a-12a), consistent with the position taken in the United States' cross-appeal, reinstating the fine originally imposed by the magistrate of $100,000 per count for Counts Two through Thirteen.

defendant's contention that criminal liability in that context was limited to the corporation itself. *Id.* at 279-285. Observing that "the only way in which a corporation can act is through the individuals who act on its behalf," *id.* at 281, the Court concluded that the corporation's "offense is committed * * * by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws," *id.* at 284.

The Court further addressed the liability of a responsible corporate officer in *United States* v. *Park*, 421 U.S. 658 (1975). In *Park*, the president of a large national food store chain was convicted of several misdemeanors after the corporation allowed adulteration of food that had traveled in interstate commerce. *Id.* at 660-666. In upholding the misdemeanor convictions, this Court observed that in prior cases under the pertinent statute, "the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime." *Id.* at 670. The Court noted that, as construed in *Dotterweich* and its progeny, "the Act imposes [upon responsible corporate agents and employees] not only a positive duty to seek out and remedy violations when they occur but also, and pri-marily, a duty to implement measures that will insure that violations will not occur." *Id.* at 672. The Court further explained:

> The concept of a "responsible relationship" to, or a "responsible share" in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in

> the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

*Id.* at 673-674.

b. Nothing in *Dotterweich* or *Park* suggests that formal designation as a *de jure* officer is a necessary condition for criminal liability as a "responsible corporate officer" under Section 1319(c)(6). "The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA." Pet. App. 7a-8a; see *id.* at 23a (district court concludes that identification of a responsible corporate officer "looks to an individual's authority and actions, not to an individual's specific title or position on an organizational chart"). A contrary approach would simply reward and encourage the sort of obfuscatory behavior in which petitioner engaged, whereby he exercised essentially plenary control over Avion's operations while assiduously attempting to avoid express association with the company. See *id.* at 22a (district court states that "[p]ermitting a defendant who functions as a responsible corporate officer to conceal his actual corporate role through creative manipulation of a company's organizational chart encourages violators to escape CWA liability through fraud").

c. Petitioner contends (Pet. 12, 21) that the court of appeals' decision conflicts with the decisions in *United States* v. *Brittain*, 931 F.2d 1413 (10th Cir. 1991); *United States* v. *Frezzo Bros., Inc.*, 461 F. Supp. 266 (E. D. Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979), cert.

denied, 444 U.S. 1074 (1980); and *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991). He asserts (Pet. 12) that the courts that decided those cases "have held a defendant liable under the responsible corporate officer provision only when the individual was a *de jure* officer of the offending entity." Petitioner's claim of a circuit conflict is without basis.

None of the cases cited by petitioner even addresses the question whether formal designation as a corporate officer is a necessary prerequisite to criminal liability under 33 U.S.C. 1319(c)(6). In *Brittain*, the defendant was convicted not as a responsible corporate officer, but as an "individual" who had through willful or negligent conduct caused a CWA violation to occur. 931 F.2d at 1419-1420 & n.5. Although the court discussed the "responsible corporate officer" provision, see *id.* at 1419, it expressed no view on the question presented here. In *Frezzo Brothers*, the district court and court of appeals rejected the individual defendants' argument that because the indictment referred to their status as corporate officers, the jury charge should have included similar language. See 461 F. Supp. at 272-273; 602 F.2d at 1130 n.11. Neither court discussed the standards governing "responsible corporate officer" liability. *MacDonald & Watson* holds that a defendant cannot be convicted of a felony under the Resource Conservation and Recovery Act simply as a "responsible corporate officer" theory because that statute expressly requires proof of knowledge to support a felony conviction. 933 F.2d at 55. The court explained that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Ibid.* Because petitioner was

convicted of misdemeanor offenses as to which a negligence standard applies, see 33 U.S.C. 1319(c)(1)(A); Pet. App. 6a, and because the CWA expressly defines the term "person" to include a "responsible corporate officer," that holding has no relevance here.

d. The evidence at trial showed that on at least one occasion—Avion's lease of the Stockton Street facility —petitioner held himself out as the "president" of Avion. See Pet. App. 4a, n.1 (noting that petitioner "signed the lease for the Stockton Street facility as Avion's president"); C.A. App. 1469, 1482. Thus, the magistrate judge could reasonably have concluded that petitioner had served as Avion's "president," see *id.* at 960-961, particularly because the only other candidate for that designation, Robert Kirk, could not even issue a check on his own authority. *Id.* at 289. Viewing the evidence in the light most favorable to the government, see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), petitioner therefore could not prevail in this Court even under his own legal theory.

2. Petitioner contends (Pet. 20-21) that he did not exercise the "responsible share in the furtherance of the transaction which the statute outlaws," *Park*, 421 U.S. at 669 (quoting *Dotterweich*, 320 U.S. at 284), that is required for criminal liability on a "responsible corporate officer" theory. The record at trial squarely refutes that argument. As we explained above, petitioner was informed of the inadequacies of the treatment systems utilized by Avion but did nothing to buy the additional equipment needed to make those systems function properly, even after the failure of those systems had become apparent. Based on that evidence, the magistrate judge found that petitioner "knew what was happening was wrong" and "knew that he had not supplied the filtration system that was required." Pet.

App. 37a. Indeed, so great was petitioner's involvement in the violations at issue that the magistrate judge at sentencing "specifically f[ou]nd that [petitioner] had actual knowledge of the violations and indeed, that he was primarily responsible for the discharges and violations of the permit." C.A. App. 1095-1096. The magistrate judge expressed the view that petitioner "received a huge break by not being prosecuted as a felon," *id.* at 1096, which would have required proof of a knowing violation. Any question as to the correctness of those factual findings would not warrant this Court's review, and in any event petitioner has wholly failed to show that those findings are clearly erroneous.[2]

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[2] Petitioner contends that

> the other courts of appeals that have upheld convictions under Section 1319(c)(6) have followed *Park* and have imposed criminal liability only where the defendant either had direct, personal supervisory responsibility over the specific corporate activities from which the illegal discharges occurred, or obtained actual awareness of possible violations of the CWA in systems subject to his ultimate control and failed to undertake appropriate investigations and corrective actions.

Pet. 22. Whether or not petitioner's formulation accurately states the governing legal standard, the evidence at trial and the magistrate judge's findings make clear that petitioner's own test is satisfied here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# REPLY BRIEF OF PETITIONER JAMES MING HONG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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# REPLY BRIEF OF PETITIONER JAMES MING HONG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents an important, unresolved legal issue that warrants review by this Court, concerning the legal standards for imposing criminal liability under the responsible corporate officer doctrine upon persons who are associated with a company that illegally releases pollutants, but who do not themselves participate in or direct the unlawful discharges.

In its Opposition, the government repeats the failure of the lower courts to define and apply the elements of the offense. It relies on various findings of fact untethered to any legal standard or to the criteria that this Court previously has defined in permitting imposition of liability upon a responsible corporate officer.

## ARGUMENT

1. Petitioner James Ming Hong was charged with liability as a "responsible corporate officer," a narrow pathway to liability established by the Clean Water Act that diminishes the quantum of proof that the government must show in order to obtain a criminal conviction. As demonstrated in the Petition, there are two essential elements of this statutory pathway: proof that the defendant (1) was a *de jure* officer of the offending entity; and (2) had a "responsible share" in the violation. The government conceded at trial that Mr. Hong was never designated a *de jure* officer of the corporation (C.A. App. 968-69, 1334) and stipulated that he had not participated in or directed the illegal discharges at issue in Counts Two through Thirteen (C.A. App. 1327-28).[1]

The government nevertheless attempted to take advantage of the diminished quantum of evidence required under the responsible corporate officer doctrine. It tried the case on the theory that Mr. Hong exercised *de facto* control over the corporation, even though he was not a *de jure* officer. The government also attempted to satisfy the responsible share requirement by showing general awareness by Mr. Hong of various facts concerning the pollution control system. The government did not show that the system was inappropriate from the outset, as it could not in the face of the two permits issued for the facility based on those controls (Opp. 3; C.A. App. 1327-28); or that Mr. Hong had ever learned during operations that illegal discharges had occurred or might occur unless prompt corrective actions were taken (C.A. App. 288, 374-75, 383-84, 500, 506-07, 1455).

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[1] The government's articulation of the Question Presented, which asserts that Mr. Hong was "personally involved in the actions that caused the violations," thus misstates the record.

To avoid the problem of a fatal variance between the theory on which Mr. Hong was charged and the proof actually adduced by the government,[2] the courts below devised and applied three different, *ad hoc* legal standards for the responsible corporate officer doctrine. Pet. App. 7a, 22a, 37a. None of these standards is consistent with the literal language or the Clean Water Act or with this Court's prior articulation of the circumstances when, consistently with the Due Process Clause, a defendant may be held liable as a responsible corporate officer based on a negligent breach of a legal duty of care.

The Opposition relies on the same standardless approach as the decisions below. It suggests that further review is not warranted because there were ample factual findings to support the conviction, with particular emphasis on the findings by the Magistrate Judge. The government places particular reliance on assertions by the Magistrate at sentencing, rather than at the liability determination stage. Opp. 12-13. The flaw in the government's approach is that the factual findings cannot be divorced from the legal standard that was being applied, and thus fail to provide a proper basis for the convictions.

As demonstrated in the Petition, each of the three courts that reviewed the matter applied a different articulation of the essential elements of the offense. No reviewing court followed the legal standard that had been applied by the court whose decision was under review. *See* Pet. 7-11, *quoting* Pet. App. 7a, 22a, 37a. For example, the Magistrate Judge convicted Mr. Hong under an ownership and *de facto* control theory. *See* Opp. 6, quoting Pet. App. 37a ("[Mr. Hong] took an actual active participation in the operations of these entities. And to that extent, I find that

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[2] *See United States v. Stirone*, 361 U.S. 212 (1960).

he's liable under the law."). Neither the district judge nor the court of appeals adopted his approach, but rather devised their own unique and unprecedented formulations of the responsible corporate officer doctrine.

The disparities in the elements of the offense formulated by the courts below underline the validity of the concerns expressed by the dissenting Justices in *Hanousek* about the improper expansion of criminal liability under the environmental laws. *United States v. Hanousek*, 176 F.3d 1116, *cert. denied*, 528 U.S. 1102, 1103 (2000) (Thomas & O'Connor, JJ., dissenting).

If the governing standard is, as the Magistrate Judge held, whether the defendant "took an actual active participation in the operation" of the offending corporation, the combination of the misdemeanor provision and the responsible corporate officer doctrine will operate in practice as a *de facto* strict liability statute. This standard is far broader than, and inconsistent with, the nexus requirement recognized by the Court in *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943).

In sum, the recurrent question about the appropriate scope of the responsible corporate officer doctrine in environmental criminal prosecutions warrants review by this Court.

2. The legal standards applied by the Fourth Circuit depart from those followed by this Court and other courts of appeals on both the "officer" element and the "responsible share" element of the offense.

With respect to the "officer" element, the government does not address the consequences of the codification of the

term "responsible corporate officer" in the Clean Water Act or the canons of construction that require that the statutory term "officer" be given its commonly understood meaning. *E.g.*, *Burks v. Lasker*, 441 U.S. 471, 478 (1979). Nor does the government dispute the showing in the Petition that the defendants convicted under the responsible corporate office doctrine in *Park*, *Dotterweich*, and Circuit court decisions applying 33 U.S.C. § 1319(c)(6) were in fact *de jure* officers of the offending entity.

The Fourth Circuit's holding – that "the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA" – on which the government relies (Opp. 10, quoting Pet. App. 7a-8a), is inherently circular and reads the "officer" requirement out of the statute. The test employed below threatens a substantial expansion of criminal liability for persons associated with corporations, especially those who may exert some degree of financial influence over small closely-held companies, by extending the diminished quantum of proof required under this liability pathway to a broader class of persons than those designated by Congress.

The inter-relationship between the responsible corporate officer doctrine and the evidentiary showing required for conviction also demonstrates the error in the government's policy argument that application of the statutory "officer" requirement would "reward and encourage" illegal pollution. Opp. 10. Adherence to the "officer" standard would not immunize from liability for unlawful discharges persons who are not *de jure* officers but who allegedly exercise control over corporate activities. Its only effect would be to preclude prosecutors from relying on the diminished quantum of proof required for conviction under the responsible corporate officer pathway. The

government would instead be obliged to make the showing required under the "person" pathway to liability, namely that the defendant negligently participated in or ordered the illegal acts.

Finally, the government argues that because Mr. Hong, in one document (whose authenticity was disputed), held himself out to be an officer of the company, he may properly be held liable as a responsible corporate officer. Opp. 12. As applied to date by this Court and the courts of appeals, however, the responsible corporate officer doctrine has not been construed to extend to "holding out" to a third party, but has applied only to *de jure* officers. Thus, rather than stating a factual question to which deference is due, the government's argument highlights the legal question presented in the Petition. It further demonstrates that the contours of the responsible corporate officer pathway to liability are so uncertain as to justify review by this Court.

3. With respect to the "responsible share" element, the government does not challenge the articulation of that standard set forth in the Petition. Rather, it contends that the evidence at trial and the Magistrate Judge's findings show that Mr. Hong had sufficient awareness of possible violations of the Clean Water Act to sustain the convictions. Opp. 13 (n.2). For example, the government asserts that "by mid-April it was common knowledge at Avion that the [pollution control] system did not work." Opp. 4. The government does not try to show, however, that this "knowledge" was ever communicated to Mr. Hong. The government also ignores undisputed evidence that general manager Robert Kirk subsequently headed off a letter from the vendor of the system that would have conveyed that information to Mr. Hong (C.A. App. 374-75; 383-84, 1455), and that the Richmond Publicly Owned Treatment Works (POTW) failed to notify Mr. Hong that Kirk had been caught illegally

discharging (C.A. App. 288, 500, 506-07). The government also does not challenge the assertion in the Petition that there was no evidence at trial that any person actually informed Mr. Hong of a failure or a possible failure of the pollution control system, and that the prosecution specifically failed to elicit such testimony from Kirk, the general manager in charge of operating the system. Pet. 6-7.

The Magistrate Judge's actual conclusion at the liability stage of the trial was that Mr. Hong could be found guilty because he had participated in the original negotiations for the purchase of the pollution control system:

> My problem comes with finding [Mr. Hong] guilty of each separate instance, because in each separate instance, I have to find guilt beyond a reasonable doubt. And, I say this, [Defense Counsel], because I assume you are going to appeal it, so you know exactly where I'm coming from. I am interpreting the statute to mean that once the owner puts the machinery into place and then negligently permits the operation of the company to discharge the effluence into the sewer system in violation of the permit, he's responsible for each separate discharge while he's in charge of the company, whether or not he's present on the premises. C.A. App. 991.

In making this finding, the Magistrate Judge was applying a theory of liability under which a person, not a *de jure* officer of the company, could be held liable under Section 1319(c)(6) as a responsible corporate officer if that individual had an ownership interest and took an active role in any aspect of corporate operations. Pet. App. 37a.

As noted, neither the district court nor the court of appeals adopted the Magistrate's interpretation of the requirements of the Clean Water Act. Further, the

Magistrate's standard does not comply with this Court's articulation of the responsible corporate officer pathway to liability, which requires proof either that a corporate officer failed to arrange for installation of adequate compliance systems in the first instance or that, after installation of adequate systems, he obtained actual awareness that the controls had failed or were in danger of failing, but neglected to institute investigations and corrective actions. *Park*, 421 U.S. at 672.

Here, the evidence shows that the pollution control system that Mr. Hong helped purchase for the facility worked at the outset. The plant was permitted twice by Richmond's POTW based on this technology. Opp. 3; C.A. App. 1327-28. The plant also operated in conformance with its permit, using this technology, after Kirk was terminated. C.A. App. 795.

The evidence of events that occurred during operations failed to show that Mr. Hong had been alerted that the pollution control system was in danger of failing. The evidence showed that Kirk actively suppressed communication of information to Mr. Hong by the vendor of the technology that would have informed him of imminent failure. C.A. App. 374-75, 383-84, 1455. Further, Mr. Hong never was informed that the City of Richmond had detected Kirk in the process of making an illegal discharge. C.A. App. 288, 500, 506-07. The only evidence the government introduced of a communication in which Mr. Hong was informed of failure of the pollution control period occurred after the period charged in the Information. C.A. App. 790. Kirk was terminated shortly after this event. C.A. App. 798.

In sum, there is no basis for the government's assertion that the Magistrate Judge's factual findings make the legal issues involved in this case irrelevant. Opp. 13. To the contrary, there is an important and unresolved legal issue

presented about the proper application of the responsible corporate officer doctrine in environmental prosecutions. Resolution of this recurrent legal question is important for the administration not only of the Clean Water Act but also other environmental statutes that include the same statutory provision.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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